IN THE

SUPREME COURT

OF THE

UNITED STATES

The City of Los Angeles, et al.,

Appellants,

vs.

Los Angeles City Water Company, et al.,

Appellees.

BRIEF FOR APPELLANTS.

This is an appeal from a decree rendered in favor of the appellees who were the complainants in the court below, which decree set aside and declared null and void an ordinance passed by the council of the appellant, City of Los Angeles, establishing water rates to be collected by all persons and corporations supplying water for domestic purposes to the inhabitants of the city for the year beginning July 1st, 1897.

The complainants relied, and the decree was wholly based, on a contract which had been entered into on July 22nd, 1868, between the City

of Los Angeles (under its then corporate name of the Mayor and Common Council of the City of Los Angeles), and the assignors of the complainant, Los Angeles City Water Company, who were John S. Griffin, Prudent Beaudry and Solomon Lazard; it being claimed by complainants, and held by the court below, that a certain provision of this contract had the effect of preventing the reduction of water rates below those which were being charged at the time of the execution of the contract, whether such reduction should be made by the City itself or by the State or any of its agents.

The contract in question (which is set forth in folios 3–9 of the Transcript of Record), does not contain a schedule of charges, but merely refers in general terms to the rates which were being collected by the lessees (as we shall hereafter style the assignors of the Los Angeles City Water Company), at the date of that contract or lease, whatever the instrument may be termed; and the bill of complaint set forth a schedule of rates, which, it is alleged, were those that were being charged by the lessees in July, 1868, and the court so finds.

The answer denied this allegation; and the assignments of error attack the finding of the court against this denial on the ground of insufficiency of the evidence to sustain it. [Assignment 17, Record fols. 269–270.]

At the time that the contract was entered into, the City was the owner of its own system of water works for supplying water to its inhabitants for domestic uses; and it was also the owner of the paramount right to the use of the waters of a stream which flowed through the City, called the Los Angeles river, by virtue of the laws of Spain and Mexico which accorded the Pueblos established by those governments the right to water courses which flowed through or along the land of such Pueblos.

The right of the City, as successor of the ancient Spanish and Mexican "Pueblo de Nuestra Senora Reina de Los Angeles," (which, translated, means Town of our Lady Queen of the Angels), has been established in a series of suits, beginning with Elms v. Los Angeles, 58 Cal. 80, and ending with City of Los Angeles v. Pomeroy, 124 Cal. 597.

In the first case it was held (without passing upon the rights of the Pueblo under the laws of Spain and Mexico), that the City, by virtue of the possession and user by itself and its predecessor, the Pueblo, ever since the establishment of the town in 1781, had become the owner of the paramount right to the use of all of the waters of the river, to the extent of its needs, and of the right of controlling and managing the user of the surface waters by the riparian proprietors above.

In the subsequent case of Vernon Irrigation Company v. Los Angeles, 106 Cal. 237, it was decided that, under the laws of Spain and Mexico, the Pueblo was the owner of the same paramount right, and that the City, as its successor, had become vested with it.

In City of Los Angeles v. Pomeroy, *supra*, this doctrine was reaffirmed, and the rights of the City were held to extend to the underflow as well as to the surface stream.

The contract in question recognizes this right in the City by several provisions, referring to the use of the river water and hereinafter quoted.

From the recitals of the lease, it also appears that the lessees were then operating the waterworks therein demised, having, in fact, acquired the rights of the lessees in a former lease of the same property previously made by the City. By this contract or lease, (or rather, contract containing a lease, for the instrument partakes of the nature of both a demise of waterworks and water, and a grant of a franchise and easements), the City purports to agree to deliver and concede to the other parties, or their assigns, the exclusive use, control, possession and management of the Los Angeles city waterworks, and all works and other personal property composing and appertaining thereto, for the term of thirty years from the approval of the contract,

with the right to sell and distribute water for domestic purposes and to receive the rents and profits thereof for their own use and benefit, including the right to lay pipes in the streets and the right of way over the lands of the City, "with the additional right to take water from the Los Angeles river at a point above or near the present dam, provided always that the said parties of the second part, their heirs, executors, administrators or assigns, shall at no time take from the said river, for the use of said waterworks, more than ten inches of water, without the previous consent of the Mayor and Common Council of said City;" it being provided that the City would, at the expiration of the thirty years, pay to the other parties, or their successors, the value of the improvements made to and upon the waterworks; and it was further provided that, "the said party of the first part hereby covenants and agrees to make no other lease, sale, contract, grant or franchise to any person or persons, corporation or company, for the sale or delivery of water to the inhabitants of said City for domestic purposes during the continuance of this contract;" and it was also provided, "that the Mayor and Common Council of said City shall have, and do reserve the right to regulate water rates charged by said parties of the second part, or their assigns, provided that they shall not so reduce such water

rates or so fix the price thereof to be less than those now charged by the parties of the second part for water;" and it was further declared that "the rights and privileges by these presents conceded to the party of the second part do not embrace to any extent or have any reference to the waterworks of said City, used for the distribution of water for the purpose of irrigation, or affect in any manner any rights of irrigation either existing at present or which may exist hereafter, excepting as to the ten inches of water as hereinbefore provided. And it is expressly stipulated and covenanted that said parties of the second part shall not dispose of any water for the purpose of irrigation, but shall only take from said river the water necessary for domestic purposes as above specified."

The second parties, by the contract, agreed to pay yearly $1500.00, and to cancel certain claims which they made against the City for repairs of the water works, and also to make certain improvements on the works including certain water pipe and hydrants, and also to erect a certain fountain in the Plaza, and also to construct such other works as would secure to the inhabitants a constant supply of water for domestic purposes; and they also agreed to furnish water for certain public purposes free of charge, and to return the waterworks to the City at the

expiration of the term upon payment of the value of the improvements; and they further bound themselves to surrender to the City a certain outstanding lease of the same waterworks which had previously been made to another party.

The contract also purported to cede to the lessees "all the rights, easements and privileges, and covenants as described and contained in a certain instrument of lease" made in 1865 by the City to one Jean L. Sansevaine; (being the lease which the lessees had obtained the assignment of, as already explained), but the bill of complaint fails to set out this lease, so that we are ignorant of its terms so far as shown by the record. [Record folio 5.]

The bill in addition to alleging the matters hereinbefore recited, averred that the contract had been assigned to the Los Angeles City Water Company prior to April 19th, 1870, and the proof showed that this assignment occurred June 12th, 1869. [Record folios 190–2.]

It is also averred that the Los Angeles City Water Company had done all of the work required by the contract to be performed, and had expended more than $2,000,000.00, (Record folio 10); but the evidence showed that up to October 1896, the Company had collected $4,228,000.00 and would, at the same rate, collect, by the end of the thirty years term, the further sum

of $750,000.00, making an aggregate of about $5,000,000.00, and that no assessments had been levied on the stockholders in excess of $79,500.00. [Record fols. 243–258.]

The rates for the year ending Nov. 1st, 1896, amounted to $422,220.46, and the other receipts brought the amount up to the gross aggregate of $439,971.79. [Record fol. 257.]

What the receipts amounted to, for the year in which the rates, established by the ordinance in question, were collected, does not appear, but the increase of rates for the last three years ending Nov. 1st, 1895, was as follows: 1892–3, $275,569; 1893–4, $345,691.64; and 1894–5, $392,636.82. [Record fols. 245–6.]

The bill further charges that the ten inches of water secured by the contract was subsequently found not to be sufficient, and that a new company, the Crystal Springs Land and Water Company, (which is also a complainant), was incorporated, and that the Los Angeles City Water Company thereupon conveyed to the new Company a tract of land which the former had purchased for a water supply, and that thereupon this Crystal Springs Land and Water Company proceeded to develop a certain amount of water upon this land, and upon other lands, which developed water was brought down in conduits to connect with the distributing plant of the Los Angeles City Water Company,

and that a lease was made to the latter company by the other one of these waters at a rental of twenty-five per cent of the gross rates collected for sale of water in the City. [Record fols. 13–14].

The evidence, however, showed that this new company was organized by the stockholders of the old corporation, and that the rental agreed to be paid under the lease, was forty per cent instead of twenty-five per cent, though this is probably immaterial as the bill does not attempt to claim that the rates are unreasonable. [Record fols. 217, 223–4.]

The object of forming this new corporation was probably two fold; firstly, to construct the headworks in the name of a company which was not a party to, nor the successor in interest of the lessees in the contract of 1868, so that the City, at the end of the term of the lease, would not have any headworks with which to supply the distributing system; and, secondly, to go through the form of taking the revenues out of one pocket and putting them in another in the shape of a rental, so as to increase the apparent expenses of supplying water to the City, and thereby justifying higher rates.

The bill also alleges that, in 1870, some dispute having occurred with reference to the rates which were being charged at the date of the contract, a committee was ap-

pointed by the Council to ascertain what those rates were, and that such committee reported a schedule of rates which was adopted by the Council as being those which should be charged by the Los Angeles City Water Company under the contract; and this schedule is set forth. [Record fols. 17–19.]

There was no evidence, except the report of this committee, introduced for the purpose of showing what the rates in 1868 were. [Record fols. 199–205.]

The bill also sets up certain provisions of the Constitution of California, adopted in 1879, and also an Act of the Legislature passed in 1881, prescribing that rates, to be charged by persons and corporations supplying cities and their inhabitants with water, should be annually fixed by the legislative body of such cities [Record fols. 22–5]; and a similar provision of a charter of the City of Los Angeles, adopted in 1889, is also set forth. [Record fols. 255–6.]

It is alleged that these constitutional and statutory provisions impaired the obligation of the contract of 1868, in allowing lower rates to be fixed than those provided in the contract, and especially in providing that any corporation, supplying water to cities, should forfeit their franchise and works if greater rates than those fixed by the Council are collected. [Record fols. 26–7.]

The ordinance in question is set forth, showing that a number of the rates prescribed in the schedule of 1870 are reduced to some extent and in some cases, but also showing that rates are allowed to be charged for a variety of purposes which were not mentioned in the schedule of 1870, and furthermore that, in certain contingencies, higher rates can be charged than those allowed in 1870. [Record fols. 28–31.]

It is averred that the revenues of the Los Angeles City Water Company, under the provisions of the ordinance attacked, will be reduced more than forty per cent. below the amount which would have been received under the contract of 1868. [Record fol. 31.]

It is further charged that the City will attempt to enforce a forfeiture in case the company should attempt to collect higher rates than those fixed by the ordinance. [Record fols. 31–2.]

The answer denies that any agreement was made by the City to the effect that the rates fixed in 1870 were those which were charged by the lessees at the date of the contract, and also denies that the revenues of the company will be at all reduced below those which would have been collected had the rates of 1870 been allowed, and also denies that the City will attempt to enforce a forfeiture.

The bill also sets up a special Act of the Leg-

islature, passed April 2nd, 1870, attempting to ratify the contract of 1868. [Record fol. 20.]

Certain exceptions were taken to portions of the bill, some of which were allowed by the court and others disallowed, but appellants do not insist upon any error with respect to the overruling of such exceptions.

Separate demurrers were interposed to the bill, one by the City, and the other by the members of the Council, who were also made parties, the first on the grounds of want of equity, want of jurisdiction, misjoinder of the City with the members of the Council, and other grounds, which were either included in those already specified or were waived; and the demurrer also set up the same grounds. [Record fols. 40–54]

The evidence consisted of a stipulation of facts which was entered into between the parties, it being provided that the court might take judicial notice of all state statutes. [Record fols. 181–258]

The appellant's assignment of errors is contained in folios 261–279, and may be briefly summarized, so far as concerns those upon which appellants rely, as follows:

1. Error in overruling the demurrer; and that the decree should have been for defendants, as the bill showed that there was no valid contract which prevented the lowering of rates.

2. The City had no power to bind itself by

the contract not to reduce water rates, and that such contract was prohibited by the acts of May 3rd, 1852, and April 22nd, 1858, the former of which prohibited cities from depriving themselves of the power of regulating water rates, and the second of which specifically provided how such water rates should be fixed, and also that such contract was contrary to the policy of the law as shown in those two statutes and other state legislation.

3. That the only statute which complainants claimed to give the City power to make the contract was that of March 11th, 1850; and it was not intended by such act to confer power on the City to deprive the City of its right to regulate water rates.

4. That the bill did not show any equity, as the ordinance, if in violation of the contract, was void on its face, and no act was attempted to be done by the City to enforce its provisions or to prevent the Company from collecting such rates as it was entitled to collect under the contract; and further, that the ordinance did not apply to the complainants if the Company was exempt from its provisions by reason of holding the contract, and also that there were other persons or corporations engaged in supplying water to which such ordinance was properly applicable; and also that the complainants had

an adequate remedy in law to enforce their rights under the contract.

5. That the ordinance in question was not a legislative act of the City, but was passed by the Council as the agent of the State, and that the City was in no wise concerned in nor responsible for the ordinance or rates therein established; and also that the Council had no authority to exempt the Los Angeles City Water Company from the operation of the ordinance, nor to make the rates applicable to any particular corporations supplying water.

6. That the company was bound by the provisions of its own charter, which subjected it to the provisions of the constitution and the act of 1881, requiring rates to be fixed by the Council.

7. That the ordinance applied to the whole City as it existed in 1897, and that from ten to fifteen square miles had been added to the original thirty-six square miles which comprised the City in 1868, and 1870, and that the contract did not apply to such additional territory.

8. That the City had no authority to make any contract with regard to a water supply except with persons or corporations holding a franchise under the State, and that the City itself could not confer a franchise.

9. That the City could not bind itself not to reduce water rates, for, if it had the power to fix

such rates, it could not part with that power, and, on the other hand, if it had no such power, it was not competent to enter into a contract with regard thereto.

10. That the City had no authority to establish a special standard of rates without regard to reasonableness, and that the contract was contrary to public policy.

11. That the contract bound only the City not to lower water rates, and did not apply to the Council acting as the agent of the State under the constitutional provisions, and that the restriction in the contract against lowering water rates applied only to the right which was reserved by the City to regulate rates and had no application to any power with which the City might be vested by the Legislature.

12. That there was no evidence to show what were the rates charged by the lessees at the date of the contract, and that many of the rates allowed by the ordinance in question were for uses which were not charged for at the date of the contract, and that there was no evidence to show that the rates of the ordinance of 1897 were lower than the rates charged in 1868; and further that it did not appear but that the revenues, derived from these additional rates, were sufficient to make up any loss which the Company might have sustained by the reduction of the rates which were in existence in 1868, and

also that there was no evidence to show that the ordinance in question reduced water rates below those which were charged by the lessees at the date of the contract; and also that the Company was collecting rates for the use of water taken by it in violation of the contract.

13. That the contract of 1868 did not have the effect of establishing the rates charged in 1868, if such rates thereafter proved to be unreasonable, and that the rates fixed by the ordinance of 1897 were reasonable; and further that the contract was not a reasonable exercise of the power given to the City by the Act of March 11th, 1850, if the contract authorized the collection of unreasonable rates.

14. That the company had, ever since October 20th, 1896, been violating a provision of the contract which prohibited it from taking more than ten inches of water without the consent of the City; and that there was no evidence to show that the City had ever given its consent to the taking of any water above that quantity; and further that there was no estoppel against the City withdrawing its consent to the taking of any additional water, if such consent was in fact given.

15. That the company had waived its right and was estopped to object to the reduction in rates below those fixed in the contract, by allowing the Council to fix rates from 1880 up to and

including 1895, and by collecting the rates so fixed, although below those claimed to be allowed in the contract, and that the claim of complainants was stale.

16. That the special Act of April 2nd, 1870, purporting to ratify the contract of 1868, was void as being in conflict with the State Constitution prohibiting the creation of private corporations.

17. That the contract of 1868 came within the provisions of the Act of March 3rd, 1852, prohibiting the City from making a contract with a water company by which the City was deprived of its right of regulating water rates, in view of the fact that the lessees in the contract obtained the same for the benefit of themselves and associates with the intention of immediately forming a water company, and of transferring the contract to such company, which was done.

18. That the complainants were not entitled to any relief, because it appeared from the bill that no decree would become final in time to protect complainants in collecting higher rates than those prescribed in the ordinance of 1897.

19. That there was no jurisdiction of the cause for the reason that nothing was being done or threatened to be done by the City to enforce the ordinance in question, nor had the company been interferred with in any way in

collecting the rates fixed by the contract, and there was no real controversy concerning the impairment of the obligation of the contract within the meaning of the Act of Congress of March 3rd, 1875, conferring jurisdiction upon circuit courts of the United States.

20. That the decree adjudged that the ordinance be vacated, set aside and held for nought, without any prayer to that effect in the bill.

The other specifications are formal, and embraced within those already mentioned.

We will now discuss the points raised in the assignment of errors

I.

The Contract Does Not Purport to Bind the State Not to Reduce Rates, But Applies Only to the City in Its Corporate Capacity.

The provision, under which appellees claim immunity from regulation of their rates, is as follows:

"Always provided that *the mayor and common council of said City* shall have, and do *reserve*, the right to regulate the water rates charged by said parties of the second part, or their assigns, provided that *they* shall not so reduce such water rates, or so fix the price thereof to be less than those now charged by the parties of the second part for water."

It will thus be seen that the clause purports

to prohibit only the municipal corporation from reducing rates below those charged by the lessees, and does not in any way attempt to declare that those rates shall not be lowered in any case.

As already remarked, the City was the owner of the water works which were leased by the contract, and as such owner would have had the right to prescribe such rates as it chose to fix, but, it would have had no power, as a municipality and owner of the property, to interfere with the management of the water plant after an absolute lease thereof, unless such power had been expressly reserved.

The term reserve is in fact made use of, and it is clearly apparent that the reservation was made by the City as landlord and owner, and not as a governmental agent of the State.

If the City had the power, as the agent of the State, to regulate charges for water, there was no necessity for inserting a reservation in the contract, and the fact of such insertion clearly shows that the parties supposed that its omission would have left the City without the right.

Here the lessor reserves the right of regulation of rates, and if the contract had stopped there, it would have vested the City with an absolute right not subject to control by the lessees; and in order to prevent the damage which would have resulted by a reduction in

water rates below those which would have afforded the interest upon the investment which the lessees desired to obtain, a *condition* was imposed on the right of regulation.

A somewhat similar reservation in a grant of franchise was construed in Logansport Gas Co. v. Peru, 89 Fed. 85, it being held that the reservation created a new right and was contractual and not legislative.

But it is plain that the restraint on the City in the present contract did not refer to the municipality acting under its legislative powers, if it had any, or to the State in its sovereign right of regulating compensation for the use of property charged with a public interest.

The ordinance establishing rates, which is attacked in the case at bar, was not enacted by the City as a municipality, but was adopted by the Council in pursuance of the requirements of the State Constitution, which enjoined on the Council, (and not on the City), the duty of fixing rates for water supplied to its inhabitants.

This constitutional provision is contained in the Constitution of California, adopted in 1879, and is as follows:

"Article XIV, Section I. The use of all water now appropriated or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use and subject to regulation and control of the State, in the man-

ner to be prescribed by law; provided that the rates or compensation to be collected by any person, company or corporation in this State for the use of water supplied to any city and county, or city or county, or the inhabitants thereof, shall be fixed annually by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance, or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month or February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action, at the suit of any party interested, and shall be liable to such further processes and penalties as the legislature may prescribe. Any person, company or corporation collecting water rates in any city and county, or city or town in this State, otherwise than as so established, shall forfeit the franchises and water works of such person, company or corporation, to the city and county, or city or town, where the same are collected, for the public use.

Section 2. The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise and may not be ex-

ercised except by authority of and in the manner prescribed by law."

This constitutional provision was supplemented by an Act of the Legislature passed March 7th, 1881 [Statutes of 1881, p. 54], the first section of which is as follows:

"Section 1. The Board of Supervisors, Town Council, Board of Alderman, or other legislative body of any city and county, city or town, are hereby authorized and empowered, and it is made their official duty, to annually fix the rates that shall be charged and collected by any person, company, association or corporation, for water furnished to any such city and county, or city or town, or the inhabitants thereof. Such rates shall be fixed at a regular or special session of such board or other legislative body, held during the month of February of each year, and shall take effect on the first day of July thereafter, and shall continue in full force and effect for the term of one year and no longer."

The State Supreme Court has decided that the ordinance or other act establishing rates is not required to be passed as a legislative act of the municipal corporation, but that it is simply the action of a tribunal to which has been delegated, by the State, the governmental power of adopting regulations of charges made for supplying water to the inhabitants of cities.

Jacobs v. Supervisors, 100 Cal. 121.

It hardly needs a citation of authorities, after the numerous decisions which have been made

by this Court, to show that franchises, of the character of the right in question, are to be strictly construed, and that all intendments are against a private individual or corporation claiming special privileges, and in favor of the State or its agent as not intending to part with any prerogative of sovereignty.

In Minturn v. La Rue, 23 How. (U. S.) 435, the rule was thus expressed:

"It is well settled rule of construction of "grants by the legislature to corporations, "whether public or private, that only such "rights and powers can be exercised under them "as are clearly comprehended within the words "of the act or derived therefrom by necessary "implication, regard being had to the objects of "the grant. Any ambiguity or doubt arising "out of the terms used by the legislature must "be resolved in favor of the public."

The case of Fanning v. Gregoire, 16 How. (U. S.) 524, is one which illustrates this principle very clearly.

There a ferry right had been granted to plaintiff for 20 years across the Mississippi river at the town of Dubuque, and it was provided that no court or board of County Commissioners should authorize any person to keep a ferry within the limits of the town of Dubuque; and afterwards the City of Dubuque, comprising the former town, was incorporated, with power to license and establish ferries across the Miss-

issippi river from the City, and under this power the City granted the defendant the right to keep a ferry between the City and the opposite shore.

The Court mentioned the fact that the license to plaintiff ran to his heirs and assigns, and that the County Commissioners were prohibited from granting a license to any other person, as indicating that it may have been intended to make the license to plaintiff exclusive, but say:

"But all the judges present, except one, held "that the grant was not intended to be exclus- "ive. In their opinion this view is sustained by "the consideration that, although the County "Court or County Commissioners were prohibit- "ed from granting another license at Dubuque, "yet this prohibition did not apply to the legis- "lature; and as it had the power to authorize "another ferry, the general authority to the "Council to license and establish ferries across "the Mississippi at the city enabled the corpora- "tion, in the exercise of its discretion, to grant a "license, as the legislature might have done."

The Court add that the restriction against the legislature granting another license does not apply in terms to it, and that it may be presumed that the increase in trade required additional ferries, and of this the granting power was the judge.

The case of the Proprietors of the Charles

River Bridge v. Proprietors of the Warren Bridge, 11 Peters U. S. 420, is a leading one on the subject of the construction of grants of franchises, and maintains the doctrine of strict construction where it is attempted to deprive the legislature of its sovereign power.

Most of the cases which we have examined relate to the question of exclusive franchises, but this question is analogous to that of the right of exacting minimum tolls; for, in both cases, the courts base their decision upon the ground that the legislature cannot be deprived of its power of future legislation by any implication which is not necessarily made from the previous grant.

In Stein v. Bienville W. Co., 141 U. S. 67, it was held that where a city (by contract confirmed by the legislature) had granted an *exclusive* right to supply the city with water from a certain creek, it was competent for the legislature to grant a franchise to another corporation to supply the same city with water from *another source*.

In Omaha &c. Co. v. Cable &c. Co., 30 Fed. 324, it was held that an *exclusive* franchise for a *horse railway* did not prevent the subsequent grant of a *cable railway franchise*.

And in Saginaw &c. Co. v. Saginaw, 28 Fed. 529, it was held that power in a charter to cause the streets to be lighted did not authorize an

exclusive grant of a franchise to furnish *gas* for 30 years, and that even *if such exclusive right could be conferred*, it would not prevent the municipality from subsequently granting a franchise to light the city with *electricity*.

That the right of regulation of water rates is vested in the State, has been determined by this court in cases involving the very constitutional provisions above referred to.

See Spring Valley W. W. v. Schottler 110 U. S. 347.

San Diego L. & S. Co. v. National City ~~U. S.~~

In the present case, appellees produce a contract which binds the municipality of Los Angeles not to lower water rates under its power of regulation reserved in the contract, and they ask, practically, that the legislature be restrained from exercising its prerogative of establishing such rates as may be reasonable (for the council is merely an instrumentality of the State in carrying into effect its policy concerning such matters).

We say that this cannot be done, and that the State cannot be thus prevented from acting for the public good where it has never deprived itself of the power.

Indeed, appellees adopt the same rule of construction in their interpretation of the language

of the covenant against a subsequent grant of the franchise of supplying the City with water.

The language, with reference to this, is: "And the said party of the first part hereby covenant and agree to make no other lease, sale, contract, grant or franchise, to any person or persons, corporation or company, for the sale or delivery of water to the inhabitants of said City for domestic purposes during the continuance of this contract; always without prejudice to any rights already granted."

Here the language is that the city will grant no other water franchise, while, with regard to the clause concerning the reduction of water rates, the language is that the City will not make such reduction.

The admission of appellees' counsel, that no exclusive franchise was attempted to be granted is, we submit, an admission that the provision under consideration did not apply to the State.

II.

The City did not possess the power to bind the State not to reduce Water Rates.

Assuming, for the purposes of argument, that the contract, properly construed, does purport in fact to vest in the lessees the absolute right to receive minimum rates, we maintain that there was no authority for the municipality to enter into such a contract.

The conferring, on a private individual or corporation, of the right to exact minimum tolls is a franchise of the highest character; for it is manifest that the possession of such a privilege may prevent the State, in promoting the public welfare, from restraining the holders of monopolies (whether created by express provision of law or by circumstances which exclude competition) from oppressing the public which they serve.

Such franchises must emanate from the State, and the rule is thus laid down in 8 Am. and Eng. Ency. of Law, 585, (1st Ed.):

"Franchises are special privileges conferred "by government upon individuals, and which do "not belong to the citizens of the country gener- "ally, of common right. It is essential to the "character of a franchise that it should be a grant "from the sovereign authority, and in this coun- "try no franchise can be held which is not de- "rived from a law of the State."

Unless the power is granted to the City by the Legislature there was no authority to execute the contract in question, since municipal corporation do not possess any implied power of entering into such agreements, so far as they seek to create a franchise.

As laid down in Cooley's Constitutional Limitations (6th Ed.) pages 227-8, "the charter or the general law under which municipalities exercise their powers is their constitution in which

they must be able to show authority for the acts they assume to perform, and they have no inherent jurisdiction to make laws or adopt regulations of government, but are governments of enumerated powers, acting by a delegated authority, so that while the State Legislature may exercise such powers of government, coming within a proper designation of legislative power, as are not expressly or impliedly prohibited, the local authorities can exercise those only which are expressly or impliedly conferred;" and at pages 231–3, it is said that the general disposition of the courts in this country has been to confine municipalities within the limits that a strict construction of the grants of powers in their charters will assign to them, and that the reasonable presumption is that the State has granted in clear and unmistakable terms all it has designed to grant at all, and that if a party assumes to deal with such a public corporation on the supposition that it possesses powers which it does not have, or to contract in any other manner than is permitted by the charter, he will not be allowed, even though he may have complied with the undertaking on his part, to maintain a suit against the corporation based on its unauthorized action.

In Dillon on Municipal Corporations, it is said:

"It is a general and undisputed proposition of

"law that a municipal corporation possesses and "can exercise the following powers and no oth- "ers: first, those granted in *express words;* sec- "ond, those *necessarily or fairly implied* in or "*incident* to the powers expressly granted; third, "those *essential* to the declared objects and pur- "poses of the corporation, not *simply convenient*, "but indispensable."

1 Dillon Mun. Corp. Sec. 89 [O. S. 55] 4th Ed. p. 145.

"Any fair, reasonable doubt concerning the "existence of power is resolved by the courts "against the corporation, and the power is de- "nied."

Id Ib.

" * * The principle of strict construction "should not be pressed in any case to such an "unreasonable extent as to defeat the legislative "purpose fairly appearing upon the entire char- "ter or enactment. Perhaps the rule, as it is "briefly expressed in the text, but embodies the "result of the adjudications upon this point, "namely: if, upon the whole, there be fair, rea- "sonable substantial doubt whether the Legisla- "ture intended to confer the authority in ques- "tion, particularly if it relates to a matter extra- "municipal or unusual in its nature, and the "exercise of which will be attended with taxes, "tolls, assessments or burdens upon the inhabi- "tants, or oppress them, or abridge natural or "common rights, or divest them of their prop- "erty, the doubt should be resolved in favor of "the citizens and against the municipality."

Id. Note 2 to Sec. 91, page 149.

And the California cases are all to the same effect.

See Lowe v. City of Marysville, 5 Cal. 214;
City of Oakland v. Carpenter, 13 Cal. 540;
Douglas v. Mayor of Placerville, 18 Cal. 643;
Zottman v. San Francisco, 20 Cal. 96;
Wallace v. Mayor San Jose, 29 Cal. 186;
Herzo v. San Francisco, 33 Cal. 134;
Nicholson Pav. Co. v. Painter, 35 Cal. 699;
People ex rel. Green v. McClintock, 45 Cal. 11;
McCoy v. Briant, 53 Cal. 247;
Aid Soc. v. Reis, 71 Cal. 633;
Raisch v. San Francisco, 80 Cal. 6;
Ex Parte Roach, 104 Cal. 272;
Von Schmidt v. Widber, 105 Cal. 151;
South Pasadena v. Terminal Ry. Co., 109 Cal. 315;
Pork Packing Co. v. Broderick, 113 Cal. 628.

The City of Los Angeles was incorporated by special act of the Legislature, passed April 4th, 1850, [Statutes of 1850, p. 155], which simply declared that the former Pueblo of Los Angeles should be incorporated as a City under the general municipal corporations act, the number of the councilmen and the time of election of city officers being fixed, and it being declared that the City should succeed to all of the rights,

claims and powers of the former Pueblo in regard to property.

This municipal corporations act was passed March 11th, 1850 [Statutes of 1850, p. 87], and prescribed the powers of those cities which should be formed thereunder, as well of cities which should be incorporated by special act.

The only authority claimed by appellees to authorize the city to make the contract of 1868, is a provision contained in Section 11 of that act which is as follows:

"Section 11. The said City Council shall have power to make by laws and ordinances not repugnant to the Constitution and laws of the United States, or of this State; to prevent and remove nuisances; to provide for licensing, regulating, and restraining theatrical and other amusements within the city; to provide for licensing any or all business not prohibited by law; to fix the amount of license tax for the same; to regulate and establish markets; to establish a board of health; to cause the streets to be cleaned and repaired; to establish a fire department, and to make regulations to prevent and extinguish fires; to regulate the inclosure of any common field belonging to or within the limits of the city; *to provide for supplying the city with water*; to impose and appropriate fines, penalties, and forfeitures for breaches of their ordinances: provided, that no fine shall be imposed of more than five hundred dollars, and no offender be imprisoned for a longer term than ten days; to levy

and collect taxes; to lay out, extend, alter, or widen streets or alleys; to establish and regulate a police; to make appropriations for any object to city expenditures; to erect and maintain poor-houses and hospitals; to prevent the introduction and spreading of diseases; and to pass such other by-laws and ordinances for the regulation of the police of such city as they shall deem necessary; which by-laws and ordinances shall be published in the manner prescribed by the city council."

Sections 12 and 13 of the same are as follows:

"Section 12. The City Council shall have power to borrow money, and pledge the faith of the city therefor; provided that a majority of the legal voters in said town or city shall so decide by an election; the notice of said election to be given by the city council at least twenty days previous to said election; and, provided, that the aggregate amount of the debts of the city shall never exceed three times its annual estimated revenue."

"Section 13. The direct taxes imposed by the City Council in any one year shall not exceed two per centum of the valuation of property within the city."

At the time of the passage of the act of March 11th, 1850, there was no statute in force in regard to the formation of private corporations, and the first private corporation act which was passed was that of April 22, 1850, [Statutes of 1850, p. 347] which did not apply to water

companies; but by an act passed May 3rd, 1852, [Section 1] certain provisions of the act of April 22nd, 1850, were made applicable to "all associations already formed or hereafter to be formed for the purpose of supplying any cities or towns in this state, or the inhabitants thereof, with pure, fresh water," and Section 3 made the following provision:

"Sec. 3. This act shall not give to any company a right to supply any city with water, unless it shall be previously authorized by an ordinance, or unless it be done in conformity with a contract entered into between the City and the Company; any contracts hereafter so made shall be valid and binding in law, but shall not take from the City the right to regulate the rates for water, nor shall any exclusive right be granted by contract or otherwise for a term exceeding twenty years."

Subsequently, on April 22nd, 1858, [Statutes of 1858, p. 218] a special act for the incorporation of water companies was passed, by which two statutes, one of April 14th, 1853, and of April 30th, 1855, were extended to "all corporations already formed or hereafter to be formed, under said acts, for the purpose of supplying any city and county, or any cities and towns in this state, or the inhabitants thereof, with pure, fresh water."

This act of April 14th, 1853, [Statutes 1853, p. 87,] was for the formation of corporations for

manufacturing, mining, mechanical or chemical purposes, or for the purpose of engaging in any species of trade or commerce, foreign or domestic, and contained no provisions specially applicable to the supplying of water; and the act of April 30th, 1855, [Statutes of 1855, p. 205], simply amended Section 1 of the first act, by extending its provisions to corporations for wharfing and dockage purposes.

By Section 2, of the Water Companies act of April 22nd, 1858, above mentioned, provision was made for the acquirement of the necessary property with which to construct and carry on the works; and by Section 3, it was provided that all privileges, immunities and franchises which might thereafter be granted to individuals and corporations supplying San Francisco with water, should be granted to corporations formed under the act.

Sections 4 and 5, of the acts are as follows:

"Section 4. All corporations formed under the provisions of this act, or claiming any of the privileges of the same, shall furnish pure fresh water, to the inhabitants of such city and county, or city or town, for family uses, so long as the supply permits, at reasonable rates and without distinction of persons, upon proper demand therefor, and shall furnish water, to the extent of their means, to such city and county, or city or town, in case of fire, or other great necessity, free of charge. And the rates to be

charged for water, shall be determined by a board of Commissioners, to be selected as follows: Two by such city and county, or city or town authorities, and two by the Water Company; and in case that four cannot agree to the valuation then, in that case, the four shall choose a fifth person, and he shall become a member of said board. If the four commissioners cannot agree upon a fifth, then the sheriff of the county shall appoint such fifth person. The decision of a majority of said board shall determine the rates to be established. The Board of Supervisors, or the proper city or town authorities, may prescribe such other proper rules relating to the delivery of water not inconsistent with this act and the laws and constitution of this state."

"Section 5. Any corporation created under the provisions of this act shall have the right, subject to the reasonable direction of the Board of Supervisors, or city or town authorities, as to the mode and manner of exercising such right, to use so much of the streets, ways and alleys in any town, city, or city and county, or any public road therein, as may be necessary for laying pipes for conducting water into any such town, city, or city and county, or through or into any part or parts thereof."

This is all the legislation in existence at the time of the execution of the contract which has any bearing upon the authority of the City to make the same, both with reference to the lease of the waterworks and the water and with re-

gard to the franchises purporting to be granted, excepting two special statutes, one passed April 11th, 1859, [Statutes of 1859, p. 199], authorizing the City to borrow $200,000 00, "for the purpose of municipal improvements, either of irrigation or for furnishing water for domestic purposes and lighting the city, and for any other purposes that may result to the benefit of the City and belong to the legitimate municipal powers of the corporation," and providing that the City should have the power to acquire property within three miles from its limits, for the purpose of making ditches, dams and reservoirs; and the other act passed Feb. 19th, 1862,[Statutes 1862, p. 10], giving the City power to borrow $25,000.00,"for the purpose of municipal improvements, either of irrigation or for furnishing water for domestic purposes."

Under these two last mentioned statutes, the City probably constructed the water works which are leased by the contract of 1868.

That the lessees did not believe that the City had authority to execute the contract, is pretty clearly shown by the fact that in 1870 they, or rather the Los Angeles City Water Company, to which the contract in the meantime had been assigned, obtained a special statute purporting to confirm the action of the city.

We submit that there is nothing in the language used in section 11 of the act of 1850

which gives countenance to the claim that the Legislature intended to vest in municipalities the right to enter into any and all contracts, at the pleasure of the municipal authorities, for the purpose of providing a water supply for the inhabitants.

The statute has never been so construed by the Supreme Court of this State, but all of the decisions, bearing upon the powers of cities with regard to such matters, proceed upon the assumption that the general provision, above referred to, does not enlarge the authority of municipal corporations so far as the entering into binding obligations is concerned.

The two special acts of 1859 and 1862, above referred to, show that it was not considered that the city had the right to borrow money for the purpose of constructing works with which "to provide for supplying the City with water."

In the case of People v. McClintock, 45 Cal. 11, a statute was passed giving the City of Sacramento power to advertise for plans, etc., and bids for machinery and connecting pipes, delivered and set up, for supplying the quantity of water required daily for the use of the City, and to submit the plans to a vote of the people, and to have the adopted plan carried out, and to issue certificates of indebtedness for the expenses; and it was held that there was no authority on

the part of the City to purchase a site upon which to construct the water works.

There are numerous cases in the State, some of which have been referred to, involving powers of cities to do some special act in performing the general powers already given, but the Supreme Court has always held that the carrying out of these general powers is to be effected by the means which the municipality possesses.

In others words, if a general power to provide a water supply is given, this does not include power to borrow money or to grant franchises therefor, but the authority to do these acts must be found elsewhere in the charter.

If a city is authorized to construct water works, it can do so with the money already in the treasury, or with such property as it already has, and the act to construct such works will be valid and not *ultra vires*.

Section 11, above referred to, gives the Council authority, by by-laws and ordinances, to provide for supplying the City with water, but no authority to grant franchises, or to enter into contracts containing obligations which the City has not the means to perform, is conferred.

The other provisions of the section would seem to refer to the exercise of the legislative powers of the City.

The word provide is used in the same section, where the Council is given power, by those by-

laws and ordinances, "to provide for licensing, regulating and restraining theatrical and other amusements within the City; and providing for licensing any or all business not prohibited by law."

Now, of course, the power to provide for licensing, etc., is one that is to be exercised by the City in its legislative capacity, and it will hardly be contended that it was competent for the Council to enter into a contract with private individuals or corporations by which the latter would be given this right of licensing.

Not only could this not be done as being an illegal delegation of legislative power, but because it was manifestly the intention that the Council should continuously provide for the licensing, regulation and restraint which it was authorized to provide for, and not to deprive itself of the power.

So with regard to the power of providing for supplying the City with water; the Council was to retain this power continuously.

As said in the case of Jackson &c. Co. v. Interstate &c. Co., 24 Fed. 306: "It (the power of controlling streets by the City) implies that the City today, tomorrow and so long as the grant remains, shall exercise its constant judgment as to the needs of the public in the streets, and not that it may today surrender to an individual or a corporation the right of determining

a score of years hence what the public may then need."

The City had commenced to exercise this power of providing for a water supply, by constructing its own works, and it attempted to effectually deprive itself of the power to carry on the work by entering into the contract in question.

At the time of the passage of the municipal corporations act of 1850, the City of Los Angeles, (or rather the Pueblo, for the City had not yet been incorporated), had the water with which to supply its inhabitants, and was actually engaged in bringing down water by means of water ditches, which had existed from the foundation of the Pueblo; but the means of constructing the works, excepting out of the current revenues, was not possessed by it until the two acts of 1859 and 1862 respectively, were passed, nor had it the power, by borrowing money, to acquire a plant.

By referring to Sections 12 and 13 of the act, it will be seen that the City was restricted from borrowing money without a vote of the electors, and the aggregate amount of the debts was limited to three times its annual estimated revenues; and the direct taxes could not exceed two per cent upon the assessed valuation of the property per annum.

And yet, with these restrictions, it is seriously claimed by appellees that it was competent for the City to enter into a contract which bound it to pay the value of all the improvements which should be made by the lessee during a long term of thirty years, which value has within the past year been fixed at $1,183,000.00 by arbitrators appointed under the contract, and the Company itself claims that it should have been at least two million dollars.

The contract binds the City to pay this value at the end of the lease, and, although the amount may not exceed the sum above mentioned, yet this circumstance is fortuitous, and the City might have been obligated, had a larger and more expensive water plant been constructed, to pay a vastly greater sum.

As said in Grand Rapids Electric etc., Co. v. Grand Rapids; 33 Fed. Rep. 659, it is simply a question of power, and if the right is conceded to make a grant for any definite period, then it follows that the time may be extended so as to be perpetual; and, on the other hand, if the power be conceded to obligate the City to pay $1,183,000, then the obligation could have been extended to an indefinitely large sum.

So with regard to the thirty years term, if it was competent for the City to confer on complainants' assignors the franchise of receiving minimum rates for thirty years, then the

time could have been extended to one hundred years or in perpetuity.

In State v. Cincinnati & Co., 18 Ohio St. 262, in construing a grant of a franchise to light the City for 25 years, it is said: "If, under the general power here given, a single City council might bind its successors not to make or permit any further use of the streets for a similar purpose for a period of 25 years, why not for 100 years, or in perpetuity? Was such the legislative intention? If so, we fail to discover it, either in the express terms of the statute, or as arising therefrom by clear and necessary implication."

There are numerous charter provisions, which have been constructed by the Court and the Courts of the several States, which gave much ampler powers with regard to the granting of franchises, and entering into contracts with regard thereto than Section 11 of the act of 1850, above referred to, but it has been uniformly held that the State could not be stripped of its general powers of supervision and regulation except by language which did not admit of a doubt.

The contract in question, may be considered as attempting to exercise three distinct powers, namely:

First. To contract with reference to the City's water works and water, which it held in trust.

Second: To confer a franchise to use the streets of the City and also to operate water-works therein, including the supplying of water to the inhabitants and the collection of rates therefor.

Third: In case it be construed to vest the absolute right to minimum rates, to exercise the strictly governmental power of declaring that it would not reduce the rates for water supplied to the inhabitants below a certain standard.

It is only with regard to the first kind of powers that the City can be considered in the light of a private corporation; for the weight of authority seems to hold that a municipal corporation has no power to confer an irrepealable franchise without express license from the legislature.

With regard to the last power, namely, the governmental one of fixing water rates for the inhabitants, as contra-distinguished from compensation for water supplied for strictly municipal uses, there can be no manner of doubt that it is only the State, in its sovereign capacity, which can confer on a private individual or corporation the right to be exempt from legislative control.

The question concerning the power of municipalities to grant franchises was discussed at great length in the case of National F. & P. W. v. Oconto W. Co., 52 Fed. Rep. 29.

There a city was vested "with the general powers possessed by municipal corporations at common law," and with authority to enact ordinances under the "general welfare" clause.

The general laws provided that cities could borrow money and issue bonds for the purchase or erection of waterworks; and could also permit the laying of pipes in the streets of the city and their maintenance and use for the purpose of conveying water, and also to own and operate waterworks, and to legislate on all matters, with reference to their construction, operation, management and protection.

Defendant was organized under an act authorizing the formation of water companies to construct and operate water works in any city, and to make any contract with such city to supply it with water for fire and other purposes upon such terms and conditions as might be agreed upon, and might by consent of the city authorities use any street, etc., for laying pipes therein, and any such city might by contract acquire the right to use the water supplied by such corporations upon such terms and conditions as should be agreed upon by such corporations and the city.

It was held that this did not give the City power to enter into a contract with a water company authorizing it to construct and operate water works therein for 30 years, and to lay

pipes in the streets, etc., to supply the City and its inhabitants with water, and to agree to pay the Company a specified annual rental for the 30 years.

The Court say that, at common law, the city would not have had the power, and although it might have contracted for a supply of water, it could not, without express legislative authority, construct or operate water works, nor grant an exclusive right to use the streets, which would be the essential result to allow a distributing plant in the streets.

"The right to use the public highways for gas "pipes or water mains rests in legislative "authority directly granted or delegated to mu- "nicipalities. So, likewise, the right to operate "waterworks is of legislative origin, and can "only be conferred by a municipal corporation "when expressly authorized by the supreme leg- "islative power of the State."

The Court then says that the City attempted to give to the Company power to construct and operate waterworks, "in addition to the right to "use the streets and public grounds of the City "for its water mains and pipes, and undertook "to regulate contracts and dealings between the "water company and the inhabitants of the City, * * * . *Whence came that power? I find no "legislative warrant for it.* The charter of the "City does not confer it. * * * The city is "therefore only authorized to permit the laying "of pipes in the streets, and their maintenance

"and use. This is not a grant of power to be-
"stow a franchise, but permission to suffer an
"easement. The law of its incorporation con-
"fers upon the Oconto Water Company the fran-
"chise, (1) to own and operate the water works,
"and (2) to use the streets of the city.
"The former power is without conditions; the
"latter is subject to the assent of the municipal-
"ity. The practical efficacy of the franchise
"may depend upon the discretionary act of the
"City. The franchise is not, however, derived
"from that discretion, but from the will of the
"Legislature. The law authorizes the City to
"assent to the exercise of a power granted by the
"statute. The grant of power to the Water Com-
"pany, as to the use of the streets, becomes ope-
"rative only upon the happening of that contin-
"gency of municipal assent. That is not a grant
"of power to a City to confer a franchise. * *
"It is, I think, clear that the power possessed by
"the City of Oconto was only to yield its assent
"to a legislative grant of the use of its streets,
"and to contract for a supply of water. The
"franchises of the Water Company were con-
"ferred by the Legislature of the State, and not
"by the ordinances of the City."

So in the case at bar; the lessees in the contract of 1868 possessed no franchise, unless they had it under the act of 1852, and, if that statute applied to them, they were subjected to the condition contained in section 3, which prohibited the City from parting with the right of regulating water rates. Indeed, the act of 1852

was equivalent to a legislative declaration that the right of granting a water franchise did not belong to cities under the municipal corporations act of 1850, for why give them the right of entering into contracts if the power already existed, and the rule of "inclusio unius," etc. is also applicable?

The doctrine enunciated in 52 Fed. 29, *supra*, is supported by the text of 8 Am. & Eng. Ency. of Law (1st. Ed.) p. 585, and authorities therein cited, to the effect that no municipal corporation has the power to confer a franchise unless authority to do so is expressly granted or necessarily inferred from the express grant.

See Dillon Mun. Corp. Sec. 724, 729;

New Orleans W. W. v. Rivers 115, U. S. 674;

Lehigh W. Co. v. Easton, 121 U. S. 388;

Stein v. Bienville W. Co. 141 U. S. 67;

Minturn v. La Rue 23 How. (U. S.) 435;

Jackson etc. Co. v. Interstate etc. Co. 24 Fed. 306;

South Pasadena v. Terminal R. W. Co. 109 Cal. 315.

So far from the City being given the power to deprive itself or the Legislature of the right of regulating water rates, we find two statutes in force at the date of the contract, the first of which (Act of 1852), expressly prohibited the City from parting with the power of fixing rates,

and the second of which (Act of 1858), provided a method by which water rates were to be fixed by Commissioners, two to be appointed by the Company, two by the City, and the fifth, in case of disagreement of the other four, to be selected by the sheriff.

Under the law in existence at the date of the contract, the City either had the power of regulating rates, or it did not possess that right.

If the power existed, the municipality could not part with it; and, on the other hand, if no such right of regulation existed, it certainly could not be conferred on private individuals.

The municipal corporations act of 1850 contains no express authority for cities to make any contract with reference to the regulation of water rates, and the other statutes of 1852 and 1858, with regard to water companies, already mentioned, state expressly that, so far as those companies were concerned, cities had no power to vest in them the right of collecting arbitrary or fixed rates.

There are several cases which deny to municipal corporations the right to vest such a power in private corporations, though possessing much larger charter powers with regard to the subject than are given by Section 11 of the Act of 1850; in fact, such charter provisions contain powers which might very well be construed as vesting the right of agreeing upon fixed rates

but for the rule of strict construction which applies in such cases.

In the case of Griffin v. Goldsboro Water Co., 122 N. C. 206 [30 S. E. Rep. p. 319], the precise question was determined, the case at bar, however, being a much stronger one in favor of our contention, as the North Carolina case was governed by a charter which gave the City authority to grant the franchise for waterworks.

In that case, the grant of the franchise stipulated that certain fixed rates should be charged to consumers, but the court held that this provision was not binding on the rate payers, though it did bind the Company.

It is there said: "While the defendant cannot charge more than the rates stipulated in the ordinance granting it the franchise, because granted upon that condition, *those rates are not binding upon the consumers*, who have a right to the protection of the courts against increased charges. Since the Constitution of 1868, [Article 8, Sec. 1], if the rates had been prescribed in a charter granted by the legislature they would be subject to revocation, and indeed independently of that constitutional provision. [Citing Stone v. Trust Co., 116 U. S. 307, and other cases]. *Still less can these rates bind consumers, if unreasonable or discriminating, since the town had authority to grant the franchise, but*

not to stipulate to rates binding upon the citizens, if the legislature does not confer that power. The rates are binding upon the company as maximum rates simply because, acting for itself, it has the power to accept the franchise upon those conditions."

In City of Danville v. Danville Water Co. 178 Ill. 299 [53 N. E. 118], it was held that a city was not authorized to agree upon fixed fire hydrant rates for 30 years under a statute authorizing it to "contract . . . for a supply of water for public use for a period not exceeding 30 years," nor under another statute which gave it power "to authorize any person or private corporation to construct and maintain the same (water works), *at such rates as may be fixed by ordinance* and for a period not exceeding 30 years."

It is said, with regard to the first statute, that the language did not necessarily imply the power to make *a fixed rate*, and that the business of supplying water to a city is public in its nature and impressed with a public interest, subject to be controlled by legislative action to the extent of being compelled to furnish the supply on equal terms and at reasonable rates; and that therefore the legislature could establish such rates or allow the city to do so.

With regard to the second statute, it was said that the meaning of the provision, allowing the

City by ordinance to establish rates, was that it should be done *from time to time and not at the beginning for all the time of the contract*, and that the clause, "for a period not exceeding 30 years," did not qualify the words "at such rates as may be fixed by ordinance." It is also said: "What might be proper for a city this year, might not be proper the next year. It is impossible to determine with absolute and even tolerable certainty what changes a few years might work in the character and reasonableness of rates to be charged for a water supply. No contract is reasonable by which the governing authority abdicates any of its legislative powers, and precludes itself from meeting, in a proper way, emergencies or occasions that may arise."

In the case of City of Carlyle vs Carlyle Water, L. & P. Co. 52 Ill. App. 577, (decided in 1893), the first statute was similarly construed, it being held that plaintiff was bound by a 30 years contract to pay reasonable rates, and as the rates fixed by the original ordinance were not shown to be unreasonable, the city was obligated to pay them. "To hold that the price could be fixed by the ordinance for water supplied for public and private use for a period of 30 years, might impose a great burden, and result in the unjust exactions of large sums of money. It is no answer to say that inhabitants are not required

to take a supply of water from the company; as well say persons are not required to patronize railroads, hackmen, ferries, etc. Neither is it any answer to say that the company would not provide such supply unless the price was fixed for the whole period; for its business being impressed with a public interest, it could be compelled to provide such supply, on equal terms and at reasonable rates. Year by year conditions and prices with respect to almost everything relating to human wants are changing, and re-adjustments are permitted to meet them."

In Brenham v. Brenham Water Co., 67 Tex. 542 [4 S. W. Rep. 143], where the charter of a city provided that it "shall be capable of contracting and being contracted with," and gave it power "to provide the City with water for the convenience of its inhabitants and the extinguishment of fires"—and the law under which defendant was organized provided that it should have full power to furnish water to the City for public or private buildings or for other purposes and to lay pipes through the streets with the consent of the city—and a general law authorized any city in which a water company was organized, to contract with it for supplying the city with water—it was *held* that while the city could make some contract for supplying itself with water, yet it was not given any express power to make a contract granting the water

company the exclusive right to supply the city and its inhabitants with water for 25 years at a fixed rate per annum; and also that such exclusive right was void as being a monopoly.

There the City's charter also gave it power "to make, regulate and establish wells, pumps and cisterns, hydrants and reservoirs" for the extinguishment of fires and the convenience of the inhabitants."

The Court say: "No express power is conferred upon the City, through either or both of the charters, to make a contract through which the water company would become entitled to the use of the streets, and to have the exclusive right to furnish the city and its inhabitants with water at a fixed rate for 25 years; and we do not see that power to make such a contract was necessary or essential to the proper exercise of the power expressly given. * * * Whether and how a municipal corporation will exercise a discretionary power conferred upon it must necessarily depend upon the determination of that question by it, in the exercise of whatever legislative power has been conferred upon it. To secure the power to carry out such legislative determination, the making of one or many contracts may become necessary. * * * The City having been given such power as we have stated, it must be understood that it was intended, not only that it might use it,

but that it should use it, if deemed necessary for the public welfare, so long as the power is possessed by it, *i. e.* until taken away by the Legislature. Will not the contract under consideration, if valid, have the effect, not only to embarrass the city government in the exercise of the power conferred upon it, but to withdraw from it the right to provide, in any other authorized way, water for public purposes and the use of its inhabitants, which was the sole purpose for which the power to erect, maintain and regulate waterworks was given to it? It seems so to us * * * the power given to a municipal corporation to contract in relation to a given subject matter does not carry the implication that it may contract, even with reference to that, so as to render it unable in the future so to contract, as to any municipal matter, in which it is given power to legislate, as may be deemed best."

The case of Flynn v. Little Falls etc. Co. 77 N. W. Rep. 38, is to the same effect.

In Des Moines v. Des Moines W. W. C., 95 Iowa, 348 [64 N. W. Rep. 269], which involved a contract made in 1871 between the City, plaintiff, and Company defendant, by which the latter was granted the exclusive franchise for 40 years to supply water to the city and inhabitants, the rates to be fixed by the arbitrators if the parties could not agree, provided that they should not

be less than the average rates fixed in other cities in the State, it was said that no unalterable standard of rates was provided for, and that "if such a contract had been made, it might "admit of very serious doubt whether it could be "sustained. By the census of 1870 the population "of the city of Des Moines was about 12,000, in "1880 it was 22,000, in 1890 it was 50,000, and "it is now a city of about 60,000 inhabitants. A "contract binding the city to the initial rate for "40 years from 1871, and up to the year 1911, "might,and probably would, be held to be so un-"conscionable and unreasonable that it could not "be enforced."

And it was also held that the agreement to submit the rate to arbitration was void because not providing for the determination of reasonable rates, as the arbitrators were to ascertain the average rates in other cities, and not what were reasonable ones.

"It is apparent that while such a stipulation "is not absolutely impossible to be performed, "yet, as between the city and its inhabitants "and the water company; it is so indefinite, im-"practicable and unreasonable, in the method "prescribed for ascertaining the rates, that it "ought not to be sustained."

In Creston W. W. Co. v. Creston, 101 Iowa 687, [70 N. W. Rep. 739] a contract (ordinance) was made by a city with a water company, under power of charter to contract with an individual or company operating water works to supply

said city with water for fire purposes, and for such other purposes as might be necessary for the health and safety thereof, and to pay therefor such sum or sums as might be agreed upon between said contracting parties. The contract provided that the company should construct and operate water works for 25 years, and charge to consumers during such term the rates fixed in the contract, or other rates that might be established by the grantee, and approved by the Council of the City.

A general law [Ch. 16] conferred upon the cities the power to regulate water rates, and to regulate and fix the charges for meters, but that the act "shall not be construed to authorize the passage of an ordinance or resolution, on the making of any contract, whereby the above powers are abridged."

Held that, until the Council established other rates, those fixed in the contract were binding.

Per Cur: "It is not alleged or shown that the rates are unreasonable, and they are, therefore, binding until other reasonable rates are fixed. That the City Council may at any time, when those rates are found to be unreasonable, fix rates that are reasonable, we think, cannot, in view of said Chapter 16, well be doubted."

Now, the power on the part of a City to contract for a supply of water for municipal purposes, such as extinguishing fires, sprinkling

streets, flushing sewers, etc., is entirely different from the power to make a contract which declares that the inhabitants shall pay certain rates for water furnished them.

The power to declare what rates shall be paid by the inhabitants for domestic water is a governmental one, and, if possessed by a municipal corporation, it is held in trust to be exercised for the benefit of its citizens and cannot be delegated or parted with; and whether such power has been given to the municipality or not, the State still retains a like and paramount authority until given up by express grant.

Authority for a municipal corporation to make contracts does not empower it to make contracts of all descriptions, but only necessary ones.

Dillon Mun. Corp. Sec. 443 [O. S. 371].

In making a contract for a supply of water, it was not necessary that the City should contract with reference to the rates which should be charged its inhabitants.

The reasons which would induce the making of a long contract, so as to guarantee to the promoters of the work a sufficient time in which to remunerate themselves for their disbursments, would not extend to the case of fixing upon an arbitrary schedule of charges.

The argument in the former case has been made that no one will invest his money in an enterprise where his right of carrying on the

business may be terminated before he has realized on his investment, whereas, with regard to the latter case, the question of the amount of water rates is one that depends upon numerous conditions which are constantly changing, and rates, which would be reasonable and proper at the time of the granting of the franchise, might, and probably would become excessive and unreasonable after the City had grown in population and extent.

Where the water supply is sufficient, it costs no more to supply a thickly populated district than where the territory is sparsely settled.

The case at bar is an illustration of this fact; and the rates which existed in the primitive condition of the City, in 1870 (two years after the contract), are unreasonable at the present time; and, as it is, the reduced ones produce an enormous interest on the investment.

In Brenham v. Brenham Water Company, 67 Tex. 542 [4 S. W. Rep. 143], the Court say that the power to agree upon fixed rates for 25 years was not necessary to the proper exercise of the power *to provide the City with water;* and as it was not expressly given, the power was denied to the City.

In State ex. rel. etc. v. Cincinnati G. L. & C. Co., 18 Ohio St. 262, holding that a City, under power in its charter to cause the City to be lighted with gas, could not contract with a pri-

vate individual, giving him the exclusive privilege of using the streets, etc., for conveying gas to the City and its citizens for 25 years, and thereafter until the City should purchase the works at a fair price, it being provided that gas should be furnished for public lamps at two-thirds of the lowest average price at which gas should be furnished to private individuals in five cities; and it was said:

"The authority to make the contract must "therefore be found, if at all, in the general "grant of power to cause the City to be lighted "with oil or gas. This power carries with it, "by implication, all such powers as are clearly "necessary for the power and convenient exer- "cise of the power expressly granted; hence we "see no reason to doubt that the City Council "might, by contract, provide for the lighting of "the City by gas; and as the use of the streets "and alleys, for the purpose of laying gas pipe "therein would be almost, if not wholly indis- "pensable to such an undertaking, it would "clearly be competent for the City Council to "grant to the contracting party the right to such "use. But no such necessity is perceived for "making the use exclusive. The same streets "might consistently be used by two or more "persons or Companies, for the purpose of lay- "ing down their gas pipes."

The case of Davenport v. Kleinschmidt, 6 Mont. 502 [13 Pac. Rep. 249], also held that a con-

tract for a specific term to supply gas at a minimum rate was void.

And in Leadville W. Co. v. Leadville, 22 Col. 297 [45 Pac. Rep. 362] it was declared that the Courts would enforce a contract providing a method of fixing water rates only where it was reasonable and not unconscionable.

The law under which the Leadville case was decided gave a City the right *to agree upon water rates* with the Company receiving a contract to supply water.

The same doctrine is held with regard to street railroad fares, and in Millhaus v. Sharp, 17 Barb. 435 [same case on appeal 27 N. Y. 611], it was decided that where the City of New York had the right to control the streets and to fix the rates of fare to be charged by public carriages (which were held to include street cars), it was not competent for the City to divest itself of the power by granting a perpetual right to use the streets for street railroads, or to surrender its power of regulating the fares by providing that a certain rate of fares should be charged without the right of the Council to change the same.

If the power to fix water rates was vested in the City, such power could not be delegated or bartered away.

With regard to the proposition that the City could strip itself or the State of the future right

to regulate water rates, if such was given by the Act of May 3, 1852, the unbroken line of authorities is to the effect that this could not be done.

"Equally incumbent upon the State Legisla-"ture and these municipal bodies is the restric-"tion that they shall adopt no irrepealable "legislation. No legislative body can so part "with its powers by any proceeding as not to be "able to continue the exercise of them. It can "and should exercise them again and again, as "often as the public interests require. Such a "body has no power, even by contract, to con-"trol and embarrass its legislative powers and "duties."

Cooley's Constitutional Lim., p. 250.

"The principle is a plain one, that the public "powers or trusts devolved by law or charter "upon the council or governing body, to be "exercised by it upon and in such manner as "it shall judge best, cannot be delegated to "others."

1 Dillon Mun. Corp. Sec. 96, (O. S. 60).

"Powers are conferred upon municipal cor-"porations for public purposes; and as their "legislative powers cannot, as we have just seen, "be delegated so they cannot, without legislative "authority, express or implied, be bargained or "bartered away. Such corporations may make "authorized contracts, but they have no power, "as a party, to make contracts or pass by-laws "which shall cede away, control or embarrass "their legislative or governmental powers, or

"which shall disable them from performing "their public duties."

1 Dillon Mun. Corp., Sec. 97 (O. S. 61).

In Jackson etc. Co. v. Interstate etc. Co., 24 Fed. 306, it was held that a City, under a power in its charter of general supervision and control of the streets, did not authorize the municipality to grant an exclusive right to construct and maintain a street railroad for 21 years.

It is said [p. 307–8]: "The Legislature has, "as the general representative of the public, the "power, subject to specific constitutional limi- "tations, to grant special privileges; it may, "with similar limitations, grant the like power "to municipal corporations as to all matters of a "purely municipal nature; but, as the posses- "sion by one individual of a privilege not open "to acquisition by others apparently conflicts "with that equality of rights which is the under- "lying principle of social organization and popu- "lar government, he who claims such exclusive "privilege must show clear warrant of title, if "not also of probable corresponding benefit to "the public. Hence the familiar rule that char- "ters, grants of franchises, privileges, etc., are to "be construed in favor of the government. "Doubts as to what is granted are resolved in "favor of the grantor, or, as often epigrammati- "cally said, a doubt destroys a grant."

Again, at page 308, it is said that "power to "permit one citizen to use the streets in a given "way is a very different thing from power to give "such citizen the right to keep every other citi-

"zen from a like use of the streets. The one "is a mere street regulation—a license; the "other rises into the dignity of a contract—a "franchise. The one may rest upon the ordi- "nary powers of street management and control, "the other requires the support of a special "grant."

It is also said at page 308, that by giving such exclusive right to occupy the street, the City practically transfers control of the streets to the grantee.

In Long v. Duluth, 49 Minn. 280 [50 N. W. Rep. 913], it was held that power in a charter to provide a system of water works, grant the right to a private corporation to establish such system and supply the municipality with water and to contract therefor, does not confer on the municipality the power to grant an exclusive franchise for 30 years, so as to disable the municipality from itself establishing water works.

It is said: "If there is any ambiguity or "reasonable doubt, arising from the terms used "by the legislature or granting body, as to "whether an exclusive franchise has been con- "ferred, or authorized to be conferred, the doubt "is to be resolved against the corporation or in- "dividual claiming such grant Public policy "does not permit an unnecessary inference of "authority to make a contract inconsistent with "the continuance of the sovereign power and "duty to make such laws as the public welfare "may require. * * * Such power was cer-

"tainly not expressly conferred. Nor was it "necessarily involved in the authority given to "contract for a water supply, and to confer the "right upon one or more private corporations to "establish water works and a supply system. "Such general language falls short of express- "ing an intention to confer the power to grant an "exclusive franchise which shall, in effect, bind "and restrict, not only the village, but the State, "in the exercise of its governmental functions for "30, 60 or 100 years, or forever. It may be said "that the power to contract would be useless, "unless the privilege conferred may be made ex- "clusive; for otherwise private corporations or "persons would not engage in an undertaking "involving the necessity for large expenditures "of capital in works which might be rendered un- "profitable, if not valueless, by the subsequent "action of the municipal or State government. "The argument is not without force. The cases "cited above, and others, show that it has often "been advanced in support of claims of exclusive "privileges, but it has rarely, if ever, prevailed. "It suggests considerations of policy which may "influence the legislature to grant, or to author- "ize the granting of, exclusive privileges; but "the principles in accordance with which legis- "lative grants of this kind are to be construed "seem to be so clearly established that, gener- "ally, not much weight can be given to such an "argument in determining the effect of particu- "lar legislative action."

In Brenham v. Brenham Water Co., 67 Tex. 542, [4 S. W. Rep. 143] *supra*, the Court in

holding the franchise void, admitted that under the power granted it was competent for the City to make some contract for supplying itself with water, but say that, as the power was not expressly given to make the contract in question, and as such power was not necessary to carry out the authority conferred, the charter could not be construed as permitting the municipality to part with its continuous right of determining the mode and manner which water should thereafter be furnished.

In Davenport v. Kleinschmidt, 6 Mont. 502, [13 Pac. 249] *supra*, the right to make a long contract was denied to a city which had authority to provide itself with gas; and in Richmond etc. Co. v. Middleton, 59 N. Y. 228, the same construction was put upon a similar charter.

The legislative powers of municipal corporations are conferred for the public good, and it is the policy of the law that the agents of the State should continue to exercise their delegated authority; and the same rule is, therefore, applied to contracts, which attempt to cede away these governmental powers confided to municipalities, as prevails with regard to legislative grants, concerning which latter the doctrine was thus laid down in Wright vs. Nagle 101 U. S. 791, holding that power to the inferior court of a county in Georgia to establish ferries and provide for all other matters relative to ferries, did

not give power to grant an exclusive right of ferry:

"Every statute which takes away from "a legislature its power, will always be construed "most strongly in favor of the State. * * The "question here is whether the legislature of "Georgia conferred on the inferior courts of its "several counties the power of contracting away "the right of the State to establish such ferries "and bridges in a particular locality as the ever "changing wants of the public should in the "progress of time require. It gave the courts "the right to establish ferries or bridges but not "to tie the hands of the public in respect to its "future necessities."

Even if the City had power to stipulate concerning rates which were to be charged by the lessees in the contract, such power did not extend to agreeing upon unreasonable rates.

Counsel for appellees practically concede this, when they admit [page 40 of Brief], that if the rates were exorbitant, a court of equity would refuse to enforce them.

We submit that all rates are exorbitant which are unreasonable, and, therefore, if the rates fixed by the ordinance which is attacked in the present suit are reasonable, it follows that those which are claimed to have been in force in 1868 are unreasonable, if higher.

Some of the cases which we have already cited, show that this principle is well settled.

It would indeed be a strange doctrine for a Court of equity to lend its assistance to a water monopoly in forcing the public to pay tolls in excess of what should be charged for the public service, and especially in the present case, where no act had been done by the municipality or any of the rate-payers to prevent the Company from exercising its rights.

Certainly, if there ever was a case where the party should be left to enforce his legal rights in a Court of law, and refused assistance in chancery, the present is such a one.

It is not attemped to allege in the bill that the rates, which have been fixed by the ordinance in question, are in any wise unreasonable.

The evidence establishes the contrary, and shows that the Company is in receipt of a princely income, far beyond the usual returns on large investments.

As already stated, according to the stipulation of facts, the Water Company has received from the date of the contract up to October 31, 1896, the enormous aggregate amount of $4,228,898.00, and would have received, by the sale of the contract, the further sum of $750,000, making in all some $5,000,000.00.

The itemized expenses are not set forth, but it is stated that during that last year a dividend of $68,200.00 was declared, and that the general construction account amounted to $173,298.00,

the expense account to $92,358.00 and the maintenance account to $75,844.00, an additional amount of $35,457 being inserted for interest. [Record fol. 257]

As before shown, it was stipulated that the Crystal Springs Land and Water Company was incorporated in December, 1886, by the same stockholders who composed the other Company, and that all of the property of the original Company, which was located outside of the City, was transferred without consideration to the new corporation, which immediately turned around and gave back a lease to the old Company of the same property at a rental of forty per cent of the gross water rates.

This forty per cent, then, is doubtless included in the expense account, and would make an additional dividend of $168,800.00, which was divided among the stockholders.

What the other expenses are made up of cannot be known, as the Company has avoided giving the itemized statement which was required by the statute; but at any rate, the facts show that it is impossible that less than reasonable rates are allowed by the ordinance, and, indeed, it is not attempted to attack it on the ground that the rates are unreasonable; nor does it appear that the Company's income was at all reduced by the alleged lesser rates provided for in the ordinance of 1897.

No assessments have been levied by the new Company, all of its expenses and the price of its property having been paid out of the water rates [Record fol. 224], and it does not appear that the old Company ever raised from its stockholders, for the purchase of property or payment of expenses, any money with the exception of $79,500.00, which was paid prior to October, 1883 [Record fol. 243].

The contract expressly provides that, at the termination of the lease, the City shall pay to the lessees, or their successors in interest, the value of all the improvements; so that, in addition to receiving the dividends which will have been paid to the stockholders during the term of the lease, they will (unless they incur a forfeiture by breach of the contract), also receive back a large amount of the expenses which have been paid by the company out of water rates, the appraised value of those improvements being, as already remarked, $1,183,000.00

It is a well settled doctrine that where tolls are allowed to be collected for services rendered to the general public, the charges must be reasonable, and in all cases there is an implied condition that this shall be so.

The doctrine is thus laid down in Hale's "De Partibus Maris," cited in Cooley's Constitutional Limitations [5th Ed.] p. 738:

"If the King or subject have a public wharf

"unto which all persons that come to that port "must come and unlade or lade their goods as "for the purpose, because they are the wharves "only licensed by the Queen, or because there is "no other wharf in that port, as it may fall out "where a port is newly erected; in that case "there cannot be taken arbitrary or excessive "duties for cranage, wharfage, pesage, &c., "neither can they be enhanced to an immoderate "rate; but the duties must be reasonable and "moderate, *though settled by the King's license or "charter.*"

In Stone v. Trust Co., 116 U. S. 307, it was held that the provision in a railroad charter allowing the Company "from time to time, to fix, regulate and receive tolls and charges by them to be received for transportation of persons and property," was subject to the limitations of the common law rule that these charges should be reasonable, and that the State could declare what was reasonable. The Court say: "This power of regulation [of charges] is a power of government, continuing in its nature; and if it can be bargained away at all, it can only be by words of positive grant or something which is in law equivalent. If there is a reasonable doubt, it must be resolved in favor of the existence of the power."

In Leadville W. Co. v. Leadville, 22 Col. 297 [45 Pac. Rep. 362], it is said that if the parties (City and Company) prescribe a mode of fixing

water rates, and this method is *reasonable and not unconscionable*, the Courts will enforce it.

In Des Moines v. Des Moines W. W. Co., 95 Iowa 348 [64 N. W. Rep. 269], already quoted from at length, the reasons for denying a right on the part of municipal corporations to establish an arbitrary standard of water rates are set forth; and the argument therein used applies with still greater force to the City of Los Angeles, which had a population of only 5,000 at the date of the contract, but has now over 100,000 inhabitants.

In the case of Santa Ana Water Co. v. San Buenaventura, 56 Fed. Rep. 339, cited and relied on by complainants, the circuit judge, in sustaining the validity of the contract involved in that case (which gave to the grantees "the *unrestrained* right to establish such rates for the supply of water to private persons as they may deem expedient, provided such rates be general"), held that there was an implied condition that the rates to be charged should be reasonable; and he only overruled the demurrer to the bill on the ground that it was expressly charged that the rates were unreasonable and did not afford a reasonable interest on the investment.

It is assumed for the purpose of this argument that the contract was a valid one and bound the City and the Legislature equally; but upon the question as to whether or not the

City originally had power to make the contract, the argument against the right to agree upon arbitrary rates, without regard to their reasonableness, applies with still greater force.

"Municipal by-laws must also be reasonable. "Whenever they appear not to be so, the court "must, as a matter of law, declare them void."

Cooley's Constitutional Limitations, p. 240–1.

It certainly cannot be contended that an ordinance is reasonable which establishes unreasonable water rates; nor can it be doubted but that water rates which are fixed for a population of 5,000 inhabitants, and, based upon certain expenses for the cost of the plant and its maintenance, would not be proper charges thirty years afterwards when the population was twenty times as great and where all of the conditions in regard to expenses had changed.

The presumption is that rates established by the Council are reasonable.

Des Moines v. Des Moines W. W. Co., 95 Iowa, 348 [54 N. W. Rep., 269] *supra.*

If the provision with regard to water rates, contained in the contract in question, is in violation of a statute, it is void under the authorities cited, if it were required to find authorities for such a proposition.

The act of May 3rd, 1852, already referred to, would seem to have assumed that associations

for supplying cities with water had been attempted to be formed under the provisions of the general corporations act of April 22nd, 1850, although that act did not expressly authorize the formation of such corporations, and it is accordingly provided that the provisions of certain chapters of the act of 1850 should apply "to all associations already formed or hereafter to be formed under said act" for those purposes.

The act of 1850 does not purport to give any corporation the right of using the streets of cities or to collect rates for water supplied to the inhabitants; and the act of 1852, expressly declares that it "shall not give to any Company a right to supply any City with water unless it shall be previously authorized by an ordinance, or unless it be done in conformity with a contract entered into between the City, and the Company; any contracts hereafter so made shall be valid, and binding in law, but shall not take from the City the right to regulate the rates for water, nor shall any exclusive right be granted by contract or otherwise, for a term exceeding 20 years."

According to the stipulation of facts, it appears that the leesees procured the contract of 1868, for the benefit of themselves and certain associates, with the intention of forming a water corporation under the act of 1858, which was ac-

cordingly done in the month following the execution of the contract, and all of the works were constructed by that Company. [Record fols. 225–6].

Even if the City was authorized to enter into a contract for a water supply with private individuals, yet, we submit that, if it was intended, at the time of procuring the contract, that it should be transferred to a corporation and that that corporation should carry out the contract, it came within the spirit of the act of 1852.

In San Francisco v. Spring Valley W. W. 48 Cal. 493, the validity of a water franchise, granted by the State to individuals upon the condition that the act should not be effective until the grantees had formed a corporation for the purpose of carrying out the franchise, was involved, and the supreme court of California held that this was in effect a grant to the corporation thereafter formed, and was within the inhibition of the Constitution which prohibited the formation of private corporations by special act.

In San Luis Water Co. v. Estrada, 117 Cal. 168, which involved the granting by the State to a private individual of a water works franchise, which was subsequently transferred to a corporation, it was conceded that, if the contract had been obtained with the intention of forming the corporation, it would have come

within the principle established in 48 Cal. 493, *supra*.

Any other construction would have rendered the Statute practically inoperative, for contracts would have been taken in every case in the name of private individuals and subsequently transferred to a corporation, for the distinct purpose of avoiding the provisions with regard to the term and exclusiveness of the franchise, as well as with reference to the power of the municipality over rates.

But even if the contract was not within the express provisions of the act of 1852, it was certainly contrary to the policy of the State as manifested in its legislation on the subject concerning the supply of water to cities.

The rule is well settled that a municipal corporation cannot pass any ordinance or enter into any contract which is in conflict either with the express letter of the statutes of the State or with the policy of those statutes.

Section 319 [O. S. 253] Dillon Mun. Corp.

In the same work, it is declared that all acts of municipal corporations, done under their implied powers, must be reasonable, and not only not in conflict with express laws, but not inconsistent with the policy of the State; and it is stated in Section 329 [O. S. 263], that the incidental powers of municipalities must be so exercised as not to

infringe or be repugnant to the policy of the State as declared in its general legislation, and instances are cited in that section and the note thereto which show that municipal corporations can do no act which it can be presumed the legislature would not have authorized them to do, judging from the policy of the State as manifested in its general laws.

Here were two statutes in existence, one declaring that, in entering into contracts with associations for supplying water to cities, the municipality should not deprive itself of the right of regulating charges, and the other providing a method by which charges, to be made by Water Companies, should be regulated by a commission, in the selection of which the City would have an equal voice; and can it be doubted that it was not the intention of the Legislature to vest in such cities the right of binding themselves and their inhabitants to fixed rates and for all time, where the water was supplied by private individuals?

If the rates fixed by the contract of 1868 could have been established for the term of 30 years, irrespective of their reasonableness, then they might have been fixed at double or treble the amount, and the inhabitants of the City would have been bound to submit to this most grievous burden, for the Com-

pany had a practical monopoly, and claimed one, as will be shown further on.

As stated in several of the cases already cited, the mere fact of a company having obtained entrance into a city and laid pipes and being engaged in supplying water, would constitute a monopoly in effect.

The needs for the commodity are constant and pressing, and consumers are bound to resort to the supply at hand.

To construct a plant for supplying a city of any considerable size, a large expenditure of capital is required, and practical experience shows that combinations, in opposition to an already established system, are rare and difficult of formation.

The old company already has the field, and new ones do not generally feel like taking the risk of entering into competition.

Moreover, under the provision which prohibits the City from granting another water franchise, contained in the contract in question, the Los Angeles City Water Company effectually deterred any one from invading its field.

The power of the City to contract does not extend to such contracts as are against public policy.

Saginaw G. L. Co. v. Saginaw, 28 Fed. 559.

The provision in the contract in question, restraining the City from reducing rates, if it be

held to apply to the State, is inconsistent with the continuance of the sovereign power and duty of the Legislature to make such laws as the public welfare may require, and is contrary to public policy.

Long v. Duluth, 49 Minn. 280, [51 N. W. 913,] *supra.*

We add the following authorities to the point that a municipal corporation cannot, without express authority from the Legislature, grant the right to take tolls.

Dillon Mun. Corp., Sections 724–729;

Cooley Con. Lim. (5th Ed.) 736 (Star page 594);

Mullarky v. Cedar Falls, 19 Iowa 21;

Colton v. Hanchette, 13 Ill. 615;

Clark v. Des Moines, 19 Iowa 223.

With regard to the power of the City to make the lease of its waterworks and water, we contend that it did not exist.

As already explained, the City was vested with the ownership of the paramount right to use all of the waters of the river to the extent of its needs, including the irrigation of lands and the supply of water for domestic purposes. It held these waters as a public trust, for the benefit of the municipality and its inhabitants.

The waterworks (which counsel for appellees attempt to show were worthless and insignificant in amount, but which the lessees were only too

willing to receive from the City), were held on the same public trust.

Property, held in this manner by a municipal corporation, cannot be disposed of without express authority from the Legislature, and the usual provisions contained in charters, authorizing the sale and leasing of property, do not apply to such public property.

The right to the river waters had been held by the former Pueblo in trust for the public benefit, and the City, as its successor, continued in the ownership upon the same trust.

The waterworks were acquired for the purpose of discharging a function confided to the City by its charter, and the cost thereof was doubtless paid with the proceeds of the bonds which were authorized to be issued by the two special acts already referred to.

In Branham v. Mayor of San Jose, 24 Cal. 602, the power of the City of San Jose, as successor of the former Pueblo, to mortgage its Pueblo lands, was passed upon by the Supreme Court of California, and it was declared that no such power existed, as the lands were held on a trust which was inconsistent with the power of mortgaging.

In Redding v. White, 27 Cal. 285, it was held that a Pueblo in California could not make a 99 years' lease of its lands, with right of renewal.

In Lux v. Haggin 69 Cal. at page 329, which

case contains a full discussion of the rights of Pueblos to the waters of streams on which they were established, it was declared that the successors of Pueblos could not dispose of the waters held in trust by them for the benefit of their inhabitants.

In Huron Water Works Co. v. City of Huron, 7 S. D. 9 [62 N. W. 975], it was held that when a City constructed water works and paid therefor by the issue of bonds, and thereafter operated the same for several years for supplying water for fire purposes and for the use of its inhabitants, (the City being authorized to make all necessary contracts for the exercise of its powers, to purchase, hold, lease and convey real and personal property for the use of the City, and to exercise all the rights and privileges pertaining to a municipal corporation; and to organize and support fire engine companies, and to construct and furnish reservoirs, etc., for protection against fires, and to construct and maintain water works and make all needful regulations concerning the distribution and use of water therefrom), it had no power to sell such property, and that it could recover back the works without repayment of money paid by the purchaser into the treasury, it not being shown that the City appropriated the money, and the Court say:

"From the examination of the authorities we consider that there is no distinction between the

nature of water works property owned and held by the City, and public parks, squares, wharves, quarries, hospitals, cemeteries, city halls, court houses, fire engines, and apparatus, and other property owned and held by the City for public use. All such property is held by the municipality as a trustee in trust for the use and benefit of the citizens of the municipality, and it cannot be sold or disposed of by the common Council of the City, except under the authority of the State legislature. Such property, as before stated is private property in the sense that the municipality cannot be deprived of it without compensation, no more than a private corporation can be deprived of its property by the law-making power. Such property is so owned and held by the municipality as the trustee of the citizens of the municipality for the use and benefit of such citizens. It has been acquired by the corporation at the expense of the tax payers of the City, for their use and benefit, and the law will not permit the corporation to divest itself of its trust, nor to deprive the citizens of their just rights as beneficiaries of the same."

The case of Mereweather v. Garret, 102 U. S. 472, is cited to the effect that property held for public use or governmental purposes, cannot be subjected to the payment of the debts of a municipal corporation, and the case of New Orleans

v. Morris, 105 U. S. 600, to the effect that water works of a city can not be sold for its debts.

In Lord v. Oconto, 47 Wis. 386, [2 N. W. 785], it was held that where a city, under authority to construct a pier and to fix and collect wharfage therefor, built the wharf and made a lease of it, such lease was void, as the power to regulate the tolls was vested only in the Mayor and Common Council and could not be delegated.

The same doctrine was held in Mullarky v. Cedar Falls, 19 Iowa 21, in regard to a deed of trust of a toll bridge belonging to the City.

In San Francisco v. Itsell, 80 Cal. 57, it was held that the City of San Francisco, which was the successor of the former Pueblo, could not dispose of lands held by it for public parks.

So where a City was empowered to erect and regulate public wharves, and fix the rates of wharfage thereat, it was held that it could not lease the wharf, farm out the revenues, and delegate to private individuals the power to fix the rates.

Matthews v. Alexandria, 68 Mo. 115.

In City of Corpus Christi v. Central Wharf and W. Co., 8 Tex. Civ. App. 194 [27 S. W. 803] the City, (plaintiff) was by its charter given the power of extending its streets to the channel of the bay, and to erect, maintain and own wharves at the end of the street as it deemed proper, and to fix the rate of wharfage

and collect the same, the State relinquishing to the City all of said rights; and it was further provided that the City could take, hold and purchase, lease, grant and convey such real and personal property or estate as the purposes of the corporation might require.

The defendant Company was, by its charter, authorized to rent or acquire, by purchase or otherwise, all water rights and property for wharves and warehouses.

The City leased to defendant, for 20 years, all of the wharf privileges owned by it, with certain limitations in the amount of rates of wharfage, and providing that no charge should be made for vessels lying along side of the wharves —the defendant being obliged to pay a rental of $4000 00 per annum.

Held that the lease was void as exceeding the powers of the City to dispose of property held in public trust, but that defendant, having enjoyed the property, could not repudiate the rent for the period of such enjoyment.

The Court quotes from Dillon Mun. Corp., Sec. 27, with regard to such property being public, and also Sec. 96, that public powers in trust could not be delegated, and say:

"The power to provide for the improvement "of the harbor of Corpus Christi and for the "erection and maintenance of public wharves, "and for the regulation of charges for their use,

"was essentially legislative, and belonged to "the Legislature of the State. By the act in "question it was relinquished to the local gov- "ernment of the City to be exercised in its "legislative discretion, for the best interests of "the people. Such powers as these, when con- "ferred upon municipal governments, cannot be "delegated, surrendered or bartered away."

With regard to the general powers of selling and leasing, it is said that this power "is an ordinary one granted to most corporations. Without express grant, it arises by implication, where the ownership of property is essential to the purposes for which it was created, and such a grant cannot be construed to authorize the surrender of governmental powers held for the public advantage."

See also Ogden v. Bear Lake etc. Co., 16 Utah 440 (52 Pac. 697).

The Supreme Court of California held the same doctrine with regard to the limitation which is put on the general words of a charter, limiting the power of a City to purchase property, as being a declaration of the corporate capacity and power of the body politic to be exercised in the mode and under the limitations subsequently provided in the charter.

Von Schmidt v. Widber, 105 Cal. 151.

The lease of the water works and the waters was the principal part of the contract, and it is

beyond doubt that neither of the parties would have entered into it but for the lease.

The title of the ordinance, authorizing the execution of the contract, shows that the purpose of the City was to provide for the care and improvement of its water works system, and as this main purpose could not be carried out by reason of its being illegal, the whole contract must fall.

Higgins v. San Diego, 118 Cal. 524.

This result will not affect the Company, as it has gone on for the whole of the 30 years' term and collected only the rates which were fixed by the Council.

III.

The Provision of the Contract of 1868, Restraining the City from Granting any other Franchise, if it Created an Exclusive Franchise, Invalidated the whole Contract.

This provision reads as follows:

"And the said party of the first part hereby covenant and agree to make no other lease, sale, contract, grant or franchise to any person or persons, corporation or company, for the sale or delivery of water to the inhabitants of said city for domestic purposes during the continuance of this contract, always without prejudice to any rights already granted."

The City is here restrained from granting any other franchise, just as it is prohibited from reducing water rates below those in existence at the date of the contract; and we submit that if the latter provision had the effect of binding the State, then an exclusive franchise was also attempted to be conferred, for the same term of binding obligation is used in both cases.

The concession, therefore, by appellees that no exclusive franchise was attempted to be given, is a confession that it was not intended to restrain the Legislature from interfering with regard to the regulation of rates.

The contention of appellees' cousel is that the prohibition against the granting of any other franchise extended only to the waters of the river, but the language used admits of no such construction.

The contract contains no reference to the source of water supply, excepting that permission is given to the lessees to take not exceeding ten inches from the river, and the fact that they were prohibited from taking more without the consent of the City, shows that it was contemplated that a different source of supply might be selected

In fact, the Crystal Spring tract, which the bill alleges was purchased by the Los Angeles City Water Company and afterwards transferred to the Crystal Springs Land and Water Com-

pany, and upon which an alleged development of water was made, was looked upon at the time of the contract as a probable source of supply, as will be shown further on.

The language used is, however, free from ambiguity, and the City is prohibited from granting to any person, company or corporation, any franchise for the sale or delivery of water to the inhabitants of the City for domestic purposes.

If, then, the restraint applied to the State as well as to the City in its corporate capacity, the effect was to create a monopoly, and inasmuch as the City did not have the express or implied power, (as shown under the authorities already cited), to grant an exclusive franchise, the provision was void and invalidated the whole contract.

This principle was discussed in the case of Welleston v. Morgan, 59 Ohio 147, [52 N. E. 127], involving the making of a lighting contract for 99 years under power to enter into one for 10 years, and it was held that the contract was wholly void, the Court saying: "The purpose is to inhibit such contracts entirely, and the only certain way of insuring their non enforcement is to prevent their attempted execution. This may not be effectually accomplished unless they are held to be void."

The same principle was applied in the case of Brenham v. Brenham Water Co., 67 Tex. 542,

[4 S. W. 143], *supra*, which holds that the grant by a city of an exclusive franchise, without power in its charter to do so, renders the whole contract void.

That this would have the effect of invalidating a contract is practically conceded in Walla Walla v. Walla etc. Co., 172 U. S. 1.

See also Higgins v. San Diego, 118 Cal. 524;

Nicholasville W. Co. v. Nicholasville, 36 S. W. Rep. 549.

As stated in the Welleston City case, the reason for declaring that an illegal provision, which is against public policy, annuls the whole contract, is to deter cities from entering into such contracts.

Although the provision may be void, yet it is a weapon which can be used to frighten and harass others who may obtain a similar grant; though, it might well happen that any municipality, entering into such an illegal arrangement, might consider itself, in honor, bound to abstain from making any other grant, and thereby practically deprive itself of the power which remained in it to provide for the public welfare by permitting competition.

The case at bar is a good illustration of the evils which are likely to attend the insertion of such an illegal restraint.

The Los Angeles City Water Company main-

tained, from the first, that a franchise could not be granted to any other corporation or individual for the purpose of supplying water for domestic purposes to the inhabitants of the City of Los Angeles, and only permitted water plants to be constructed for the supplying of localities which were inaccessible to its system.

The case of Los Angeles City Water Company v. Stern and others, which was brought in the Superior Court of the County in which the City is situated, had the effect of doing just what we claim would be done under similar circumstances, and the defendants, who had obtained the grant of a water franchise from the City, after being harassed and delayed by the litigation which was precipitated on it by the Los Angeles City Water Company, finally succumbed, so as to leave the field to the Company.

In that case defendants contended that the franchise was not intended to apply to any waters except the Los Angeles river, but the learned Judge of the *nisi prius* Court held that the contention was not well founded, though the attempted grant of the exclusive franchise was decided to be void.

Inasmuch as the opinion in that case discussed many of the questions involved here, we append a copy thereof to our brief, and respectfully re-

for this Court to the same for a discussion of the different questions involved.

IV.

The Special Act of 1870, Purporting to Ratify the Contract of 1868, is Unconstitutional and Void.

It is claimed by appellees that, if the contract in question was invalid in its inception, it was confirmed and validated by a special act of the Legislature which was passed April 2nd, 1870, and a copy of which is is set out in Record folios 209-10.

It reads as follows:

"An act to ratify certain acts and ordinances of the Mayor and Common Council of the City of Los Angeles.

"The People of the State of California, represented in senate and assembly, do enact as follows:

"Section 1. The following acts, contracts and ordinances of the Mayor and Common Council of the City of Los Angeles are hereby ratified and confirmed: The contract and *lease* for the care and maintenance of the Los Angeles City Water Works, entered into and made between the Mayor and Common Council of the City of Los Angeles, on the one part, and John S. Griffin, Prudent Beaudry and Solomon Lazard on the other part, dated the twentieth (20th) day of July, eighteen hundred and sixty-eight,

(1868); and also the ordinance confirmatory of the same, passed July the twenty-second (22nd), eighteen hundred and sixty eight, which contract and ordinance are recorded in the office of the County Recorder of Los Angeles County, in Book One of Miscellaneous Records, pages four hundred and twenty-eight (428) to four hundred and thirty-one (431);" (here follows certain other ordinances and deeds not affecting the contract in question).

At the time of the passage of this act, the contract of 1868 had been formally assigned to the Los Angeles City Water Company [Record folios 190–2].

However, as already explained, the Company was organized in the month succeeding the date of the contract, and thereupon proceeded with the construction of the works and the performance of the other obligations imposed on lessees and those original lessees did nothing in performance of the contract.

In fact, the evidence showed that the contract had been obtained by the lessees for themselves and associates, with the intention of immediately forming a corporation under the act of 1858, and of having that Company carry out the agreement.

The Constitution of California, in existence at the date of the contract, provided [Article 4 Sec. 31] as follows:

"Sec. 31 Corporations may be formed under

general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed."

In San Francisco v. Spring Valley W. W., 28 Cal. 493, *supra*, it was determined that a special act of the Legislature, granting a water franchise in the City of San Francisco to private individuals, with the condition that the act should not take effect until those individuals should organize themselves into a water company, was, in effect, a grant to a corporation of a corporate franchise, and had the effect of creating a private corporation within the inhibition of the constitutional provision just quoted.

The case was thoroughly argued, and the opinion of the Court contains an exhaustive review of the cases in California and other States upon the subject; and it was held that the Constitution aimed at the prevention of the conferring of franchises upon private corporations and was not intended merely to prevent the simple creation of such corporations.

The Court dwelt upon the fact that, if it were competent for the Legislature to give special powers to corporations already created, the constitutional provision would become nugatory, as corporations could be created under general laws without any powers, and then special

powers and privileges could be bestowed by special statutes.

The same principle was established in the cases of Spring Valley W. W. v. Bryant, 52 Cal. 132, and San Francisco v. W. W. 53 Cal. 708, wherein it was held that a special statute, providing for a board of water commissioners to fix rates in the City of San Francisco, was unconstitutional, so far as the act attempted to provide a mode for fixing water rates to be charged by Water Companies different from that provided for establishing rates to be allowed to other Companies formed under the general law.

In Oregon Valley R. R. Co. v. Plumas Co., 37 Cal. 364, (decided in April, 1869,) it had been held that the Legislature could not authorize the County to grant special privileges to a private corporation; and this was confirmed in Waterloo Turnpike Co. v. Cole, 51 Cal. 384, (decided in 1876.)

Counsel for appellees cite the case of California Tel. Co. v. Alta Tel. Co., 22 Cal. 398, as having established a rule of property in holding that it was competent for the Legislature to confer a franchise upon a private corporation by special act.

By reference to the report of that case, it will be found that a grant by the Legislature of a franchise to private individuals was involved,

and that the Supreme Court was then composed of three justices, only two of whom joined in the decision and only one of whom placed the decision upon the ground that the constitutional provision in question did not apply.

We, therefore, have an opinion by one out of three judges, and the case affords no authority for the proposition contended for by appellees.

So far as a rule of property is concerned, the case in 37th Cal. 364 was decided before the passage of the special act of 1870, and therefore controlled the construction of the constitutional provision under consideration.

In addition to the subsequent cases, to which we have referred, there was a prior case decided in 1856, that of Low v. Marysville, 5 Cal. 214, which decided that if it were possible to consider a municipal corporation in the light of a private corporation, so far as its transacting the business of a private corporation was concerned, it was not competent for the Legislature to grant to the municipality by special act a special power or privilege with relation to such business.

The Court say: "For as it would have been in violation of the constitution to create an incorporation by special act, for other than municipal purposes, it follows that it would be equally unconstitutional to confer special powers on a corporation already created."

The question is settled in California, and there is no case holding to the contrary.

The case of People v. Stanford, 77 Cal. 371, involved the acquirement of a street railroad franchise by a street railroad corporation, by assignment from the original grantees of the State, and there is nothing in that case which militates against the doctrine established in 48 Cal. 493.

Counsel for appellees argue that the act should be treated as one vesting power in the City to make the contract, and as having effect by relation as of the date of the contract, and the Court below so held; but this contention cannot be sustained.

The act does not purpose to vest in the City the power generally to make contracts with reference to providing a supply of water, but attempts to confirm a particular contract, and is exactly of the same nature as if an act had been passed prior to the execution of the contract specially authorizing the City to enter into it.

It therefore, falls within the decision in Waterloo Turnpike Co. v. Cole, 51 Cal. 381, *supra*, holding that an act of the legislature, authorizing a County to confer a turnpike franchise upon a particular corporation, was void as violating the provisions of the old constitution prohibiting the formation of private corporations by special act.

Where the legislature is prohibited from doing an act, it cannot do it through the medium of a municipal corporation.

Cooley Const. Lim. [6th Ed.] 238–9;

Grand Rapids etc. Co. v. Grand Rapids, 33 Fed. 672.

The claim of counsel that the act can be considered as a confirmatory one, and not as operating as an original grant to the Company, is opposed to the rule of law that a void contract cannot be confirmed.

This is not a technical rule, as applied in the present case, but rests on an absolutely sound principle.

This is illustrated by the case of the People v. Law, 34 Barb 509, where it was held that an act of the legislature, confirming a resolution of the Common Council of New York which purported to grant the right to construct a street railroad, had the effect *of conferring an original grant* of power to construct the road.

In that case it was assumed that the Council had no power to grant the franchise, and the Court say that the statute would have been void if treated simply as a confirmatory act.

In Strange v. Dubuque, 62 Iowa 303, this precise question was involved, and it was there decided that where a municipal corporation had no power to grant a franchise to a particular street railroad Company, a statute confirming

an ordinance making such grant was unconstitutional.

In the case of Los Angeles City Water Company v. Stern, decided by the Superior Court, already referred to, the act of 1870 was declared void as being in effect a grant to the Company.

V.

Los Angeles City Water Company Has No Power Under Its Charter to Collect Water Rates Except as Prescribed By the Constitution and Statutes of the State.

According to the stipulation of facts, the Company was incorporated in 1868, as a water company, under the laws of California, which, as we have seen, was the statute of 1858, [Record folios 226].

The Constitution of California, [Art. 4 Sec. 31] at the time of the execution of the contract in question, and at the time of the incorporation of the Company, contained the provision (cited under the foregoing point) that: "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed."

Subsequent to the incorporation of the Los

Angeles City Water Company, a new Constitution was adopted in California, containing the provisions with regard to water rates which have already been set forth, and the act of 1881 was also enacted providing for the carrying out of these constitutional provisions; all of which has been set out in the preceding part of this brief. [pp. 24–6].

As determined in a series of cases, decided in the Supreme Court of California and in this Court, it was competent for the State, either through its Constitution or by statutes enacted by its Legislature, to change the mode of fixing water rates collected by corporations supplying water for public use, to the extent of the resumption by the State of its original prerogative of establishing such rates itself or through the medium of a commission or tribunal provided by the constitution or a statute.

Spring Valley W. W. v. Supervisors, 7 Pacific Coast Law Journal 614 (not reported in Cal. Reports).

Spring Valley W. W. v. San Francisco 61 Cal. 18;

Spring Valley W. W. v. Schottler, 110 U. S. 362;

San Diego L. & T. Co. v. National City, 174 U. S. 740.

The water companies' act of 1858, providing for the fixing of rates by commissioners, ap-

pointed as we have already explained, was the charter of the Los Angeles City Water Company, and this Court and the Supreme Court of California, in the cases above cited, have held that the constitutional provision, prescribing the mode of fixing water rates by the Council or other legislative body of municipal corporations, was, in effect, an amendment of the act of 1858, and that corporations previously organized were bound by the new mode.

Can the Company, then, demand that the water rates shall be fixed in any manner except as provided in its charter?

"The charter of a corporation serves a two-"fold purpose: it operates as a law conferring "upon the corporators the right or franchise of "acting in a corporate capacity, and further-"more it contains the terms of the fundamental "agreement between the corporators themselves.

Sec. 316, Morawetz on Private Corporations, p. 299.

The doctrine is thus expressed by this Court in the case of Thomas v. Railroad Co., 101 U. S. 71:

"We take the general doctrine to be in this "country, though there may be exceptional cases "and some authorities to the contrary, that the "powers of corporations organized under legisla-"tive statutes are such, and such only, as those 'statutes confer. Conceding the rule applica-"ble to all statutes, that what is fairly implied is

"as much granted as what is expressed, it re-
"mains that the charter of a corporation is the
"measure of its powers, and that the enumera-
"tion of these powers implies the exclusion of
"all others."

By the Act of 1858, as modified by the constitutional provision above referred to and the Act of 1881, water companies have the right to collect rates established by the legislative body of the city in which they do business, and they have no right to collect any others.

They owe their existence to the law under which they are incorporated, and it does not lie in their mouth to deny that they are bound by the provisions of that law.

The Los Angeles City Water Company has no power, except as conferred by its charter, and as that charter does not give it the right to collect rates other than those fixed by the Council, the Company cannot claim it, for to do so would be to exercise a corporate function which has been denied to it by the author of its being.

The fact that it has acquired a contract which gave to the grantees and their assigns the privilege in question, cannot alter the case, as the Company had no power to acquire such a right.

It is altogether different from the case of a purchase of land or other tangible property,

which corporations are authorized by their charter to acquire; for the possession of such property does not require the exercise of a corporate franchise.

Several cases have been decided by this Court involving the right of corporations to claim such privileges in conflict with the provisions of their own charters, and it has been uniformly held that the acceptance of a charter from the State and of the benefits accorded thereby, precluded the corporation from denying the validity and binding obligation of the regulations prescribed by such charter.

In St. Louis etc. R. R. Co. v. Berry, 113 U.S. 465, this Court decided that where a railroad corporation was exempt from taxation, such right of exemption could not be transferred to any other corporation, organized under a law which declared that the property of corporations should be taxed.

This doctrine was affirmed in Chesapeake etc. R. R. Co. v. Miller, 114 U. S. 176.

Morgan v. Louisiana, 93 U. S. 217, had determined the question in the same way, and in that case the court pointed out the difference between the ordinary privileges of a corporation which are necessary to enable them to do business, and those special privileges which are not necessary to the existence of the corporation, saying that these latter are personal and incap-

able of transfer without express statutory direction.

To the same effect is Wilson v. Gaines, 103 U. S. 417.

In Stone v. Trust Co., 116 U. S. 307, it was decided that, even with regard to the original corporation, its charter right of fixing its own tolls could be controlled by the State.

The case of Norfolk etc. R. R. Co. v. Pendleton, 156 U. S. 667, involved the right of a railroad company to fix its own freights and fares under the charter of the original Company, which consisted of a general railroad incorporation act providing that they should not exceed certain rates, and that when the Company had realized certain profits, the State could fix the tolls provided that they should be enough to produce a certain interest, and further, that the act should be subject to amendments, etc., except as to tolls; and also, under a special charter of the predecessor of plaintiff in error, by which it was provided that the Company might regulate and prescribe its tolls, not exceeding such as would produce a certain net income. The railroad was built by another company (which would seem to have acquired the rights of the first company by purchase or conveyance). A third corporation was formed by special act to acquire the property of the second company and others, it being pro-

vided that as the stock of such companies should be absorbed by the new corporation, the latter should become vested with all of the rights of franchise and of property belonging to the other companies. The new corporation gave a mortgage on its works, franchises and property, which was foreclosed, and plaintiff in error became the purchaser. The charter of the new corporation provided that it should be subject to all the laws of the state applying to railroad corporations generally, (one of which authorized the rates complained of). It would also seem from the opinion that the new corporation was authorized to acquire or become vested with the franchises of the first corporation, though this may have resulted from the fact that the second corporation had acquired the rights of the first. The charter of the first corporation was to the subscribers, their executors, administrators and assigns. It was held that plaintiff could not claim the right to tolls given to the first corporation, and that the immunity from state regulation of tolls given to the first corporation did not pass, the court saying: "If the original companies did make a contract with the State whereby, until a certain amount of money should be earned, they should have the right to fix and regulate their charges, it is clear that the Alt., Miss, and O. R. R. Co. (third corporation,) accepted their charter with a distinct pro-

vision that the company should be subject to the general laws of the commonwealth, one of which was the very law, then and still in force, which prescribed the tariff of rates enforced in the present suits. It is equally obvious that the Nor. & West. R. R. Co., the plaintiffs in error, by becoming the legal successor to the Alt., Miss. & O. R. R. Co. was brought within the scope of those general laws, and cannot successfully claim immunity under the charters of the previous companies. * * * We have frequently held that in the absence of express statutory direction, or of an equivalent implication by neccessary construction, provisions in restriction of the right of the State to tax the property or to regulate the affairs of its corporations, do not pass to new corporations succeeding, by consolidation, or by purchase under foreclosure, to the property and ordinary franchises of the first grantee; that a mortgage of the franchise and property of a corporation made in the exercise of a power given by the Statute, confers no right upon purchasers at a foreclosure sale to exist as the same corporation, but to reorganize a new corporation, subject to the laws existing at the time of the reorganization. This we have stated to be a salutary rule of interpretation, founded upon obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and therefore

not to be extended beyond the exact and express requirements of the grant construed strictissimi juris."

The doctrine was adhered to in the case of Covington R. R. Co. v. Sanford, 164 U. S. 587, with regard to the charter of a Turnpike Company.

This doctrine is really in keeping with the rule of law which attends all ordinary contracts, that one claiming the benefit of a privilege must bear the burdens imposed by the contract or law extending it.

Here is a corporation admitting that it has no existence except under a law which provides how it shall claim compensation for the use of water, the furnishing of which is its only business, and at the same time it claims exemption from that provision of its charter; we submit that it cannot do so, and that any action on its part in conflict with the laws of California, (which are to be considered as a part of its charter, so far as they relate to its powers), would be *ultra vires*, and not allowable.

IV.

The Company has Waived its Right to, and is Estopped From Claiming, Equitable Relief Against the Regulation of Rates by the Council, by Acquiescence in Such Regulation Ever Since 1880, and is Guilty of Laches.

The stipulation of facts shows that in each year since and including 1880, the Council, in pursuance of the constitutional provision requiring it to establish water rates, has, by ordinance, established less rates than those which prevailed in 1870, (which are claimed by appellees to be those in existence in 1868). [Record folios 227–438].

No objections were made to the passage of the ordinances of 1880 and 1881, but in 1882, the Water Company protested against the City's establishing rates on any basis other than the contract of 1868; and in each year thereafter, beginning with February 20, 1883, the Company, in pretended compliance with the Act of 1881, filed with the Council a statement showing its general receipts and disbursements for the previous year, together with a list of the consumers and the amount paid by each, and accompanied by a perfunctory protest against fixing rates lower than those provided in the contract. [Record fols. 238–558.]

No other action was ever taken by the Company in insisting upon its rights to collect other rates than those fixed by the Council. [Record folios 216.]

It thus appears that the complainant, Los Angeles City Water Company, has allowed the Council, for 16 years, to establish rates below those which are claimed to have been fixed by the contract, and that they only appeared in the court below for relief a little over two years before the expiration of the thirty year term of their franchise.

We submit that complainants have been guilty of such acquiescence in the action of the Council as to estop them from maintaining the present suit, and that, even if this be not so, their laches, in not sooner seeking an injunction against the infringement of their rights, is fatal.

The rule in such cases is thus briefly laid down in a leading decision on the subject:

"Nothing can call forth this Court of Equity "into activity but conscience, good faith and "*reasonable diligence.*"

Smith v. Clay, 2 Ambl. 645.

A party is precluded from obtaining distinctly equitable remedies by acquiescence in the wrongful doing of another.

Sec. 817, 418-419, Pomeroy's Equity Jurisprudence;

Sec. 17–18, Beach's Modern Equity Jurisprudence.

As stated in the last authority [Sec. 17], the doctrine "is based upon considerations that the "delay has *or may have been prejudicial*, by reason "of the difficulty of proving the facts, or by the "intervention of equities in favor of innocent "persons, or perhaps *from other causes.*"

In the case of Pennsylvania Mutual Ins. Co. v. Austin, 168 U. S. 685, the doctrine in the text was reiterated, and it was held that equity would withhold relief from those whom a state statute deprived of their property without due process of law, where they have delayed the assertion of their claims for an unreasonable time, even if such laches is not pleaded.

In the present case, appellees are endeavoring to prove water rates which existed *in pais* nearly thirty years ago, and the amount of which it would be very difficult, if not impossible, at the present late date, to ascertain; and they have shown their inability to obtain proof of the fact by failing to introduce any testimony which tended to prove what those rates were.

It is a plain case of acquiescence, for the protests which were made as a matter of form, accompanying each statement furnished in accordance with law, cannot change the effect of the Company's act of commission and omission.

The Company simply said that it protested, but it acquiesced in the action of the Council by collecting the rates thus fixed, which were less than those to which it claimed to have been entitled [Record fol. 216].

They may not have lost their legal rights by failure to assert them; and, if this is the case, a court of law is the proper forum in which to enforce those rights, not a court of equity, which assists only the active and vigilant.

Counsel for appellees claim that the reduction in rates was only slight until the two years of 1896 and 1897, when the first suit and the present one were brought to set aside the ordinance; but there is nothing to substantiate this in the record and the contrary is the fact.

The reason for the Company's acqiescence is very apparent when it is considered that it was obtaining its whole water supply up to 1887 from the river, amounting to several hundred inches above the ten inches which the contract permitted the lessees to take, and, from that time down to the commencement of this suit, the Company took at least two-thirds of its water from the surface stream of the river, obtaining the other third from the alleged development which is claimed to have been made by the Crystal Springs Land and Water Company, and which, as shown by the record in the case of Crystal Springs Land and Water Company

et al, vs. City of Los Angeles, now before this Court, is claimed by the City to be an abstraction of the under flow of the river, and of the same character as the waters which were held to belong to the City in the case of City of Los Angeles v. Pomeroy et al., 124 Cal. already cited.

It was evidently the fear that the City would prevent the unlimited use of the river water that induced the Company to acquiesce in the reduction of rates, (if it thought, which is hard to believe, that the Council did not have the power to make the reduction).

Here we have it that the Company was taking an unstinted amount of river water, far beyond the quantity which it had an uncontrolled right to take, and at the same time the Council was regulating rates without regard to the provisions of the contract; and is it not apparent that the Company considered that it was getting an equivalent at least for permitting the reduction of rates, especially as it continued to derive an income out of all proportion to the amount invested, and based really upon the free use of the City's water?

Had the Company been compelled to seek a supply elsewhere an expenditure of millions of dollars would have been required, and it was the interest on the capital, that would have been em-

ployed in such an undertaking, which represents the value of the use of the river water.

And now, the company, while engaged in using this water *ad libitum*, turns around, two years before the expiration of the thirty years term, and tells the City that it must not continue to do that which the council has been doing for 15 or 16 years, although the Company is still obtaining its full water supply from the source which belongs to the City.

VII.

The Water Rates Fixed by the Ordinance in Question were not shown to be lower than those prescribed by the contract, and, if they were, it was not shown that the Company derived a less income under the ordinance than would have been received had the contract rates been allowed.

There is no testimony in the record which tends to show that the rates established by the ordinance of 1897 are below those which were being charged by Griffin, Beaudry and Lazard at the time of the execution of the contract in 1868; nor was there any evidence given concerning the latter rates.

The only thing, which complainants rely on to establish this fact, is the recital in the report of a committee of the Council appointed in 1870

for the purpose of agreeing with the Water Company upon a schedule of water rates to be charged, in which it stated (by the joint committee) "that they have established water rates and charges for domestic purposes, *taking as a guide as near as can be the charges and rates for domestic purposes charged in July, 1868.* That your committee have also fixed the rates and charges for other reasonable objects and purposes, and report as follows:"

Now, in the first place, this is not a statement of whether or not the rates fixed in 1870 were equal to those which existed in July, 1868, for it might very well have been that the minimum rates of the contract were not adopted, but higher ones fixed.

Of course, if the contract was recognized as binding, the rates would not have been lowered below those which existed in 1868, but they might have been raised.

Again, it is distinctly stated that the charges and rates which were fixed with reference to those which existed in July, 1868, were only for *domestic purposes*, and that the committee had also fixed the rates and charges for *other reasonable objects and purposes*, but not saying that the latter rates were based on those of 1868.

By looking at the schedule, which appears in folios 201–5 of the Record, it will be seen that

there are numerous purposes for which water rates are fixed outside of those strictly domestic.

For instance, bathing tubs in barber shops, use of water in bakeries and boarding schools, water used for building purposes and for fountains, water for horses and for washing carriages, horse troughs, sprinkling of gardens and the front of lots, water for groceries and other business places, water for railroad uses and steam engines, public water closets, and water used in large quantities for other purposes, manufacturing and mechanical, are also specified.

Moreover, the statement contained in this report is simply the hearsay declarations of a committee of the Council, and cannot be held to bind the City or to establish any fact except that such a report was given.

If the rates on July 22, 1868, were higher than those fixed in 1897, it was incumbent upon appellees to prove the fact as to what the latter were by competent testimony, which has not been done.

They have simply proved that *a report was made*, but they have not shown that any of the *statements concerning past events* contained in that report *were true*.

A municipal corporation cannot be bound by the statements of any of its officers concerning past transactions.

1 Dillon Municipal Corporations [4th Ed.] Sec. 237 Note on pages 321–2.

Complainants have thus failed to establish a fact on which their recovery depends, and which is put in issue by the pleadings.

Assuming that the water rates for domestic purposes, contained in the schedule of 1870, were in fact those which were being charged by the lessees at the date of the contract, yet it does not appear that the income of the Company would have been greater if those rates had been allowed and no others authorized by the ordinance of 1897, which is attacked in the present suit.

As before remarked there are numerous purposes, other than domestic, which are prescribed in the schedule of 1870, the rates for which do not appear to have been fixed by the committee with reference to any charges which were being made in 1868, nor does it appear from the report of the committee (there being no other evidence), that any charges were being made for these purposes at the time of the execution of the contract.

Moreover, by inspecting the ordinance of 1897 [Record fols. 28–30], it will be seen that there are some rates allowed thereby for domestic purposes, which may give a greater amount than those prescribed by the schedule of 1870.

For instance, the schedule of 1870 allows two

dollars for every dwelling house, occupied by not more than five persons, and 25 cents for each additional person, without regard to the number of rooms in the house; whereas the ordinance of 1897 prescribes a rate of 50 cents for every dwelling house not exceeding three rooms, and $1.25 for every dwelling house not exceeding 10 rooms, and 5 cents for each additional room over 10 rooms, so that a dwelling house, not occupied by more than five persons, might have to pay a higher rate under the ordinance than under the schedule.

There are also water rates allowed for purposes in the ordinance which are not provided for in the schedule, such as for private fire hydrants, soda fountains, saloons, elevators, halls, warehouses, photograph galleries, book binderies and machine shops, and "other purposes not enumerated" in the ordinance (the charge for which latter general purposes is 75 cents per month), etc.

We have it then that the Company was allowed to charge rates which were not being collected in 1868, and *non constat* but that these additional rates offset the loss which the Company may have sustained in the reduction of rates for domestic purposes, in case such reduction was in fact made.

The stipulation of facts did not admit that the income of the Company would have been in-

creased by the allowance of the rates contained in the schedule of 1870 only, but that if these latter rates had been allowed *in addition* to the others allowed by the ordinance of 1897, the income would have been $50,000.00 larger.

The evidence showed that the income of the Company from all sources was far beyond the revenues which are ordinarily derived from other investments, and there is no complaint that any of the rates fixed by the ordinance are unreasonable or that the Company is prevented from receiving reasonable and adequate compensation for the water which it furnishes to the inhabitants of the City.

In the case of Logansport, etc. Gas Co. v. Peru, 89 Fed. 189, already cited, it was held that where a gas company had collected rates for ten years and made a large profit so as to pay back all the money invested, beside 10 per cent per annum, the City, which had granted the franchise to the Company, could take such past profits into consideration in establishing rates, and was not bound to fix them so as to afford the Company a reasonable interest for the current year on its investment.

So, in the case at bar, the water company has, by the use of the City's water, been able to pay for its works, and in addition to that divided millions of dollars in dividends, and is still entitled to receive from the City the

value of the improvements, which have thus been paid for with the money collected from the citizens, amounting to the further sum of nearly $1,200,000.00.

We submit then that it was incumbent upon the Company to prove that not only were the rates in fact reduced, but that the income which it would have derived from the rates which were being charged at the time of the execution of the contract in 1868 would alone have afforded a greater income than that which was derived from the rates of the ordinance of 1897, and that, in fixing the rates in 1897, the Council was not compelled to adopt the rates of 1868 if all of the rates which were fixed had the effect of producing as great an income as those charged in 1868 would have afforded.

VII.

If the Contract of 1868 is Valid, and the Ordinance of 1897 Reduces the Income of the Company below that Which it Should Receive, the Ordinance is Void on its Face as Being in Conflict With the Federal Constitution, and is no Cloud on Complainants' Title.

The courts of California are required to take judicial notice of all statutes, private as well as public.

Section 1875 Code Civil Procedure.

The special act of April 2nd, 1870 in effect sets forth the contract, and therefore that instrument will be taken judicial notice of.

There was nothing being done by the City under the ordinance in question which interfered with appellees, in any way, in the collection of rates which they might have been entitled to receive under the contract; no attempt was made to prevent them from managing their property as they pleased; nor was the City or any of its officers interfering with that property.

The ordinance did not single out the Los Angeles City Water Company, nor is there any thing contained therein which shows that the Council intended to assert that the contract was invalid or that the Company had not the right to charge the rates which were in existence in 1868.

The Council was merely discharging a duty imposed on it by the Constitution and the statute of 1881, and it had no jurisdiction to determine what persons or corporations were, by reason of holding special contracts, exempt from the regulation of water rates provided for by those laws.

It had no authority to declare that the Los Angeles City Water Company should not be governed by the prescribed water rates, as its duty was to fix general water rates, and whether any particular person or corporation could

charge other rates, was a matter with which it had no concern, but the right was to be asserted by the privileged individual or corporation in the proper mode.

If the Company had a valid contract, it should have gone on and collected the rates authorized by that instrument.

Its remedy was to disregard the ordinance, as stated in the case of Austin v. Austin etc. Asso. 87 Tex. 330. [47 Am. St. Rep. 114], cited by appellees; in which case it was held that, where an ordinance not only prohibited the cemetery association from using its grounds for burial purposes, but also forbade the public from making use of them, the remedy was to enjoin the execution of the ordinance; but it was said that if the association alone had been prohibited, its remedy would have been to disregard the ordinance, and defeat the prosecution for its violation.

In Spring Valley W. W. v. Bartlett, 16 Fed. Rep. 615, it was held that the passage of an ordinance, establishing water rates in San Francisco, which would have the effect (as claimed) of impairing the obligation of a contract between the State and a Water Company (embodied in the water companies' act of 1858 above mentioned), would not be enjoined by injunction, as the ordinance would be void on its face by reason of its unconstitutionality and there being an ade-

quate remedy in law against any attempt to enforce it.

The same doctrine was declared by Justice Field in Alpers v. San Francisco, 32 Fed, 503, in which he refused to grant an injunction against the execution of a contract which had the effect of impairing the obligation of a former contract entered into between the City and the complainant.

In Murphy v. East Portland, 42 Fed. Rep. 308, the Court refused to enjoin the passage of an ordinance providing for the making of a contract with a water company in violation of law, it being said that the ordinance was not self-executing, and that the remedy was to prevent the levying of illegal taxes which would have to be raised to carry out the scheme.

In Stevens v. St. Mary's etc. School, 144 Ill 336, [36 Am. St. Rep. 438], an injunction was refused to restrain the commissioners of a county from passing a resolution to enter into an illegal contract or ordering a claim thereon to be paid, and it is there said that this will be done only when it is necessary to prevent irreparable injury.

The only ground on which the appellees base their claim to relief in the present case is that, if the ordinance is valid, and they violate its provisions, the City can enforce a forfeiture of the franchise and works.

As a matter of fact, the dreaded forfeiture cannot very well occur in view of the contractual relations which exist between the City and the Company, by virtue of which the City is the real owner of the distributing plant, subject to a lien and right of possession for the protection of such lien on the part of the Company.

This was so held in the case which is referred to in appellees' brief, City of Los Angeles vs. The Los Angeles City Water Company, 124 Cal., at page 385.

In a case which was brought a comparatively short time after the execution of the contract, the Company's attorneys took the position that it was only an agent of the City without any ownership of the water works, and this position has been sustained in the case in 124 Cal. above cited.

See City of Los Angeles vs. Los Angeles City Water Company, 40 Cal. 638.

Therefore, the constitutional provision, with regard to the incurring of a forfeiture by the charging of higher rates than those fixed by the Council, cannot apply here.

But even if it could, we submit that this would be no reason for interference by a court of equity.

If the forfeiture would be incurred, it would only be by reason of the fact that the Company is not entitled to the claimed exemption, and therefore it would have no right to question the

ordinance; in other words, it is in no danger of the forfeiture if it is entitled to collect the rates of 1868, and therefore cannot be harmed by the constitutional provision, and, on the other hand, if it is not entitled to those rates, then a forfeiture would be only a just penalty to be inflicted.

The fact is that the Company wants to have a mere theoretical question determined, for it is obvious that it could not have obtained a final decree in time to have assured it of the validity of the contract as to the right to collect the rates charged in 1868, for, before such final decree could have been obtained, or rather before such decree would have become final, the year would have passed, as has actually happened.

The decree of the lower court would not be any guaranty that the contract was in fact valid, because such decree might be reversed on appeal, and consequently the Company would be in the same position, substantially, after such decree was rendered as it was at the time of the commencement of the suit; and the facts of the case show that this is true, for the Company has gone right on collecting the rates prescribed by the ordinance of 1897, and has not attempted to collect any others.

In addition to what has already been said, it may be remarked that the decree declares the whole ordinance void; whereas, there were other water companies engaged in supplying water to

the inhabitants of the City at the same time, and who could not claim exemption under the contract of 1868, if there was any.

It appears from the bill of complaint that the East Side Spring Water Company was engaged in that business, and *non constat*, but that there were other persons or corporati ns also supplying water (which is actually the fact), and therefore, the ordinance was applicable to them and should not have been annulled.

It also appeared from the stipulation of facts [Record fol. 226], that the original territory of the City, at the time of the execution of the contract of 1868, embraced only 36 square miles, but that, since that time, the limits had been extended so as to add from 10 to 15 miles of additional territory, and that the Water Company had extended its system beyond the old limits into the newly added portions.

Whatever may be said concerning the applicability of a contract, giving privileges within the limits of municipal corporations, to territory added to the City, there can be no doubt but that this is a matter of legislative intention at the time of the extension of the City's limits; and, therefore, if it appeared that the Legislature did not intend that the privileges given in the contract should apply to the portions of the City which were thus subsequently added, such a law declaring that the privileges given in the

contract shall not be applicable to territory not originally embraced in the City, could not be considered as impairing the obligation of the contract.

When the contract of 1868 was made, there was nothing in the law which declared that the exemption should apply to subsequent additions to the City, and, consequently, appellees assignors were not entitled to claim that the privileges accorded by the contract should extend beyond the old limits.

Most of the new additions to the City were made after the Constitution of 1879 was adopted, and therefore, there was a law in existence, at the time that the City limits were extended, declaring, in effect, that the exemption from reduction of water rates should not apply to the extension.

VIII.

The Company was Engaged in violating the Contract of 1868 by Taking Water From the Los Angeles River, and is Therefore not Entitled to Specific Performance of the Contract.

The contract in addition to conceding the use of the waterworks and the right to lay pipes, etc., concedes to the lessees "the additional

right to take water from the Los Angeles river at a point above or near the present dam, provided, always, that the said parties of the second part, their heirs, executors, administrators or assigns, shall at no time take from said river for the use of said waterworks more than ten inches of water, without the previous consent of the Mayor and Common Council of said City; and that they will, within sixty days from the date hereof, select a point from which water will be taken from said river." [Record fols. 184–5]

The contract further on contains this provision:

"Provided, always, that the rights and privi-"leges by these presents conceded to said "parties of the second part do not embrace, to "any extent, or have any reference to the water-"works of said City, used for the purposes of "irrigation, or affect in any manner any rights "of irrigation, either existing at present or "which may exist hereafter, except as to the "ten inches of water, as hereinbefore provided. "And it is expressly stipulated and covenanted "that said parties of the second part shall not "dispose of any water for the purpose of irriga-"tion, but shall only take from said river the "water necessary for domestic purposes, as above "specified." [Record fol. 187]

In October, 1896, the City required the Company to attorn to it and to agree to pay a rental of forty per cent of the gross rates collected by

it for supplying water for domestic purposes (being the identical rental that the Company had agreed to pay to its creature, the Crystal Springs Land & Water Company, for water pretended to have been developed by the latter company), or to desist from using the same, but the Company refused either to attorn or to pay the rental, and went on taking the usual quantity of water, amounting to from 400 to 1000 inches, against the orders of the City [Record fols. 220–3].

It is claimed on behalf of the Company that the term "ten inches" does not mean ten inches measured under a four-inch pressure, but refers to some indefinite quantity, the amount of which has been agreed upon between the parties, by the Company's taking, on the one hand, and the City's permitting the taking, on the other, of an amount of water corresponding to the needs of the Company; and that, if this contention is not well founded, then the City has given its consent, within the meaning of the contract, to the Company's taking as much water as was required for the purpose of operating the works as they existed in October, 1896, (when the City gave notice to the Company), and is estopped to withdraw such consent by reason of the fact that the Company, relying on it, has gone on and constructed the waterworks for the purpose of utilizing this water.

With regard to the first proposition, namely, that by limiting the amount of water to ten inches the City did not really restrict the lessees at all, on account of the indefiniteness of the term, we think that the contrary is the case, and that if ten inches meant nothing, then, logically, the lessees were prohibited from taking any water without the consent of the City; for the contract, in effect, purports to give the right to take only ten inches, (unless the lessor's consent be obtained), and therefore, if ten inches meant nothing, the lessees had no right to take any water.

In entering into the contract, the City had to exercise some judgment as to the amount of water which was to be taken by the lessees, and, as it is apparent that some limitation was intended, the provision for taking any water at all is void if the language used is intelligible.

The principal authority in support of the extraordinary position of counsel is the case of Dougherty v. Haggin, 56 Cal. 552, which involved a verdict in which the amount of water was described as being so many miner's inches, without further specifying the pressure or in what way the measurement was to be made, and it was held that this was defective for a verdict or judgment.

But there is a great distinction between a judgment and a contract, for, in the latter, the

intention of the parties is to be deducted, not only from the writing itself, but from the circumstances under which it was executed and the situation of the parties; in other words, the intention of the parties controls, while a judgment must speak for itself.

The term "four inches measured under a four inch pressure," does not fully describe the amount of water, which that term indicates, to one who is nnacquainted with such matters; and to the mind of a well educated person who has never lived in that section of the west where this mode of water measurement prevails, the language would convey no meaning.

It would be necessary to explain to such a person that one inch of water, measured under a four-inch pressure, meant a quantity of water continually flowing through an aparture one inch square in the side of a reservoir of still water, the center of which aperture was located four inches below the surface of the water.

In some places the four inches, vertical height, are measured from the top of the orifice, and there may be other questions in regard to the fall of the conduit inserted in the orifice to convey away the water, and the thickness of the board or other side of the reservoir in which the hole is cut, all which may cut some figure in the quantity of water which will be discharged.

Then again, when more than one inch is to be

measured, the question might arise as to whether two inches of water means two seperate inches measured through two different apertures, or a quantity passing through an aperture one inch deep and two inches wide, in which latter case, by the removal of a proportional part of the friction, the quantity would be increased; and so on, indefinitely, showing that the measurement depends upon the custom of the country in which it is used.

The contract is not void on its face, in speaking generally of ten inches of water, and when the Company attempts, under this provision, to claim 400 to 1000 inches, measured under a four inch pressure, in a lease of 10 inches, it is incumbent on it to show that such greater quantity is meant, which was not done in the present case.

We understand, in fact, that a miner's inch means one inch measured under a four inch pressure, but that there is a variation in the amount, owing to the fact that, in some localities, the four inches is measured from the centre of the orifice, and in others from the top; but this would undoubtedly be good in a contract, if supplemented by evidence of the meaning attached to it by the usage in the particular locality.

The term "inch of water" can have no meaning unless it be considered with reference to a measurement under four inch pressure, as

already explained, and this Court will take judicial notice of the fact that the expression was in common use in California from very early times, and long before the execution of the contract in 1868.

The Civil Code of California, which was adopted in the session of 1871-2 (Sections 1410–1422) contained a title upon the appropriation of water rising on public lands, and one of the provisions (Section 1415) is that the party intending to appropriate the water shall specify in his notice of appropriation the number of inches measured under a four inch pressure.

This chapter was put into force by special act in May, 1872, but it had been prepared by a code commission appointed several years before.

The very use of the term "inches" in Section 1415, *supra*, shows that it was a well recognized one, for if it had not been some additional language would have been required in order to show what was meant.

Whether the measurement should be made from the center of the orifice or from the top, and whether the ten inches should be measured through one hole one inch deep and ten inches wide, or through ten different holes each one inch square, can make no difference, as appellees cannot, by the exercise of any ingenuity or casuistry, evolve

400 to 1000 inches of water measured under a four-inch pressure from ten inches of water.

It is claimed by appellees that inasmuch as the ten inches of water would not have been sufficient to supply more than 1000 inhabitants out of the 5000 people, who were living in the City at the date of the contract, it is apparent that the contract could not have intended to limit the appellees to ten inches measured under a four-inch pressure.

It is manifest however, that the intention was to limit the quantity to some extent, and not to give the right to take an unlimited amount, for there would have been no sense in inserting the restriction if the lessees were to have the privilege of taking to the extent of the needs of the water system.

The probability is that the lessees never contemplated that the City would increase to any considerable extent, and the subsequent growth of Los Angeles from 5000 to 100,000 population was, doubtless, never dreamed of by them.

The lessees may have had some other water source in view, to which they would have recourse in case the City chose to exercise its privilege of withholding consent to the taking of more than the limited amount, and this is the actual fact, for the Company, as alleged in the bill, acquired a piece of water-bearing land

known as the Crystal Springs Tract, and it was supposed that this would be sufficient.

As shown in the record of the case of Crystal Springs Land and Water Company, et al, v. City of Los Angeles, now pending before this Court on appeal, the Company, or its successor Crystal Springs Land and Water Company, did attempt to make a development of water on this same Crystal Springs Tract, and claims to have so developed some 600 inches of water.

With regard to the other proposition that the parties have interpreted the term to mean as much water as was needed, by the Company's using that much with the consent of the City, the provision of the contract, which gives the lessees the right to take, with the consent of the City, an unlimited amount of water, is a sufficient answer; for the user of the amount of water which the Company has diverted during the term of the contract is to be referred to this provision, coming, as it does, strictly within its terms.

The rule, that the interpretation placed by parties on a contract controls, does not apply to the acts of authorities of municipal corporations.

National W. W. Co. v. School Dist., 48 Fed. 523.

But it is absurd to say that the parties did not, in fact, intend to impose any restrictions when they declared that the lessees should not take

more than ten inches, and it is equally absurd to say that, where the City acquiesced in the using of all the water that was necessary to supply the works, it was because the parties construed the ten inches to mean the amount so used, when the Company was expressly given the right to make use of that amount with the consent of the City.

So, with reference to the claim that the City, having once given its consent to the present use of the water, could not retract that permission and prevent the further diversion, we maintain that this privilege was inherent in the contract.

The evident and plain meaning of the contract is that the consent shall be a *continuing one*, for the language is that the lessees shall "at no time" take for the use of the water-works more than ten inches, without the "previous consent" of the City, and that they would, within sixty days, select the point from which the water should be taken from the river.

It is evident that the parties meant that, before any water should be taken, the consent of the City should be had for the particular period of time during which the lessees should use it, thus requiring a continuing consent; and that the moment that the City refused such consent the right of the Company to make the diversion would cease.

It is certainly a forced construction of the language to say that, if the City consented to the Company's using the water during a particular period of time, the consent would extend over the future indefinitely; for it cannot be said that there was a previous consent to the user for any subsequent period of time when the consent had been given only for a prior period.

No express consent is shown, but the City merely passively suffered the Company to use water without restriction, owing to the fact that, if the Company had been prevented from diverting the water, the City would have had its supply cut off.

The Company simply took the water, relying upon the inability of the City to prohibit it, for the latter had placed its waterworks in the hands of the former, and was thus disabled from making use of the water.

The authorities, cited by counsel for appellees, and by the Court below, do not bear them out in any way in their contention, to uphold which it would be necessary to say that the City could part with its rights to the river waters by estoppel when it was disabled to do so by conveyance.

Ever since the adoption of its charter of March 26th, 1874 [Statutes 1873–4, p. 633], the City has been disabled by express statute from parting with its rights to the river water, but

even if this statutory prohibition had not existed it would still have had no power to part with any of its rights, as shown by the authorities cited in the latter part of Point II.

The population did not exceed 11,000 in 1880, and doubtless was less than 10,000 in 1874; and at the rate of one inch per hundred people, the quantity of water then used could not have exceeded 100 inches, whereas the Company was, at the time of the filing of the bill, using 400 to 1000 inches of the surface stream and 600 inches of the underflow.

The City held the waters in trust for its inhabitants for municipal purposes, and this right it could not dispose of, nor could its title be divested, either by adverse occupation or by estoppel *in pais*.

The authorities cited by appellees in their brief and by the Court below, are based upon licenses which contemplated the vesting of a right for a time as to which the license was enforced, or involved a parol grant or agreement to convey, followed by part performance entitling the licensee to compel a conveyance of the legal title.

In none of them was it decided that the owner of property was estopped from revoking a license or consent to use his real property, where it is agreed that the user will be made only with his consent; nor do these or any other cases

hold that where an individual or corporation is without power to make a conveyance or other disposition of his or its property, such conveyance or disposition can be effected by estoppel *in pais*.

The City of Los Angeles had no power under the law to dispose of its water rights, and it, therefore, could not be estopped by any acts or acquiescence of its officers.

But even, in cases where persons *sui juris* are concerned, a license to use real property, where the understanding is that no absolute right for any definite period is intended to be given, can always be countermanded.

"A license is an authority to do a positive act, or series of acts, on another's land without possessing any estate therein."

1 Washburne Real Property, marginal p. 398.

The general rule is that a license may be revoked at any time at the pleasure of the licensor.

Emerson v. Bergin, 76 Cal. 201.

The general rule, as settled by the weight of authority, is that an executory license is revocable at the will of the licensor, even though the licensee has expended money on the faith of the licensor, and that, too, without refunding the expenditure.

Potter v. Mercer, 53 Cal. 673.

"Another class of cases where the license may be revoked, is where the act licensed to be done is to be done upon the land of the licensor, and if granted by deed would amount to an easement therein. If such license be by parol it may be revoked as to an act thereafter to be done, even though in order to enjoy it the licensee may have incurred expenses upon the premises of the licensor."

Washburne Real Property, marg. p. 400, et seq.

In Goddard's Law of Easements (Bennetts ed. 1880) page 471, it is laid down: "A license is also irrevocable if the licensee, acting upon the permission granted, has executed a work of a permanent character, and has incurred expense in its execution. This rule of law appears to be based upon the injustice which would be inflicted upon the licensee if, after he had laid out money and had executed a permanent work, the licenser was permitted to revoke his license and make him destroy his work, and so lose the money expended, or if he were allowed to treat him as a wrong doer and recover damages for the very act for which he gave permission."

But the American editor adds (pp. 472–5) that it is generally agreed that a parol license, sufficient in terms to create an easement, if in a deed, is irrevocable although executed by the

licensee; and adds that some early cases seem not to have given full force to this view.

He also says (p. 472): "The authorities generally referred to on this subject show that the rule sometimes laid down in the books, that a license executed cannot be countermanded, is not applicable to licenses which, if given by deed, would create an easement, but only to licenses, which, if given by deed would *extinguish* or *modify* an easement. They also show that the distinction, sometimes taken in the books, between a license to do acts on the licensee's own land and a license to do acts on the licensers land is the same distinction that is made between licenses which, if held valid, would create and licenses which extinguish or modify an easement."

"An easement always implies an interest in the land on or over which it is to be enjoyed. A license carries no such interest. The interest of an easement may be a freehold or a chattel one, according to its duration; whereas, whatever right one has in another's land by license may, as a general proposition, be said to be revocable at will by the owner of the land on which it is to be enjoyed."

Washburne's Easements (4th ed.) 6 (marg. p. 5).

"These (easements), being interests in land, can only be acquired by grant, and

by deed, or what is deemed to be equivalent thereto, a parol license being insufficient for the purpose." Id. 27 [Star p. 18].

"And this [power of revocation] extends to all acts to be done on the land of the licensor, so far as the same have not been executed, even though the licensee may have incurred expenditures of money upon the land of the licensor, upon the faith of such license."

Id. 28 [Star p. 19].

The author then goes on to say [28–9, Star page 19] that the law of the several States is as stated, so far as applies to unexecuted licenses, but that there is an exception in some States in case of executed licenses, where the licensee has incurred expense in executing them, when equity will hold for purposes of remedy that such shall be deemed an executed contract; but that in most of the States the doctrine prevails that no permanent estate in land can be created by parol, and that the licensee holds his privilege strictly at the will of the licensor. "But the distinction * * * between a license to do an act upon the licensor's land, and that to do it upon the land of the licensee, should not be overlooked; since the last, when executed, is not revocable."

Id. 29 [Star p. 19].

The editor then adds [p. 29–30]: "The doctrine that equity will interfere in some cases of

oral license to prevent great damage arising to the licensee from the revocation of a license appears to be gaining ground. Two at least (New York and Connecticut) of the States cited above as adhering to the old common law doctrine have fully accepted the equitable rule, and others which are not mentioned above have also decided in the same way. The principle is that where two persons have entered into a complete, sufficient and legal contract for a license, which contract is not only fully founded upon a *valuable consideration*, but of which the terms are defined by satisfactory proof, and accompanied by acts of part performance unequivocally referable to the supposed agreement, equity will regard such a contract for a license *as creating an easement*, and will enforce the easement either by compelling the grantor to give a deed of the easement, or by restraining him from interfering with the grantee in his enjoyment of the right acquired by the contract. The terms of the contract, however, must be plain and definite. *If they are indefinite, as if it is doubtful whether the license is to be for life or at the pleasure of the grantor or otherwise, equity will not enforce the agreement; or if the evidence is too vague to establish any agreement, or if the acts of part performance are not so clear, definite and certain in their object and design as to point exclusively to a*

complete and perfect agreement, of which they are a part execution."

At page 352 [Star p. 243], it is said that equity will in some states "enforce executed licenses, though by parol, if granted upon a consideration or upon the faith of which money has been expended, if the licensee would be without adequate compensation if the license were revoked."

"This doctrine (that a license to do an act on "the licensee's land, which would have the ef- "fect of destroying an easement on such land "in favor of the licensor, cannot be revoked) "does not extend to what are called natural "easements, like the flow of a stream of water "through the licensee's land into that of "the licensor. A license to stop or divert "it upon the licensee's land is just as revocable as "if the act was to be done upon that of the "licensor. * * * But until executed, a parol license "may be revoked."

Id. 727 [star page 560].

A multitude of cases are cited in the text in support of the doctrine therein laid down, and it will be found that all of them proceed upon the theory that a license is never irrevocable where it appears to be intended to continue during the pleasure of the lioensor, and that the licensee cannot make a license irrevocable by imprudently expending money upon the hope and ex-

pectation that the license will not be countermanded.

One who recklessly engages in the construction of works involving a large expenditure of money, without securing the right from the owner of property necessary to be utilized for the undertaking, will not be allowed to secure to himself the same indefeasible right that he would have had by obtaining a conveyance assuring the needed privileges.

In the case at bar the Company never asked for the consent of the City to the use of the water needed for the works, evidently under the fear that a condition of sharing the water rates with the municipality would be imposed.

The situation was simply this, that the Company was deriving a revenue from the waterworks system, (the principal part of which was the river water), sufficient to pay for the construction of all of the works and to afford a handsome profit besides, and it could therefore lose nothing by finding itself in the possession of works, paid for with the rates already collected, even if it should be deprived of the future privilege of making use of the river water without stint and without price.

The Company did not construct the works on the faith of being allowed to use the river water, *but in performance of its contract to do so.*. Suppose that the city had refused to give its con-

sent at the beginning of the contract, would this have absolved the Company from procuring a supply elsewhere.

In order to constitute an estoppel by conduct the party claiming the estoppel must have placed himself, in some respect, in a worse position than he otherwise would have done.

Bowman v. Cudworth, 31 Cal. 153.

The Company was enabled, through the position which it occupied, to dictate to the City and to prevent the use by the latter of its water.

The City could not enforce a demand against the Company to refrain from using the river water, as there was no means of distributing the supply except through the works already in existence; and the City could not take possession of the Company's property, but was bound to allow its own property to be used.

It may be asked, then why did the City attempt to revoke its implied consent to the use of the river water by the Company?

The reply is this, that the Company had already commenced a suit to set aside the ordinance establishing rates for the year 1896–7, and it was, therefore, thought only proper that, if the municipality had the legal right through the exercise of its reserved power of forbidding any use of the river water over the very small quantity of ten inches allowed by the contract, to prevent the collection of exorbitant rates, it was

only right and just, in the interests of its citizens, to do so.

Besides this, the Company had, by reason of its having established the only water plant for the supply of the greater portion of the City, been enabled to go on, year after year, collecting revenues derived from the use of the City's water, while the latter was powerless to prevent it, and it was considered that the interest of the City required its officials to attempt, at least, to force the Company to pay over some part of these revenues.

Every provision of the contract in favor of the Company has been utilized by it to the fullest extent, and the corporation has stood upon its legal rights at all times; and it seems very strange if the City, on the other hand, would not be allowed to take advantage of the provision in its favor, which was inserted in the contract with the full knowledge and consent of the lessees, by which the Company could be forced to pay some compensation for the use of the water.

That the Company was not intended to take the water for the original small population of 5000 or 6000, without paying anything therefor, is shown by the exaction of a rental of $1500 per annum; and when the quantity was increased a hundred fold, why should not the rental have been increased in proportion?

In addition to the authorities referred to in the text books already cited, we refer the Court to the following authorities, holding that licenses with respect to real property can be revoked, even after the licensee has incurred expense on the faith of the license.

Morse v. Copeland, 2 Gray, 302.

Wood v. Edes, 2 Allen, 578.

Mason v. Holt, 1 Allen, 45.

Houston v. Laffer, 46 N. H., 505.

Crosdale v. Lanigan, 129 N. Y., 60 4[29 N. E. 824].

Hathaway v. Y. W. L. & P. Co., 44 Pac. Rep. 896.

Wheeler v. St. J. etc. Co., 2 Mo. App. Rep. 1309.

Jensen v. Hunter, 41 Pac. Rep. 14.

It is only in exceptional cases that an estoppel can be invoked against a municipal corporation.

Clunie v. Sacramento, 120 Cal. 29.

It is claimed in appellees' brief that the Supreme Court of California, in the case of City of Los Angeles v Los Angeles City Water Company, 124 Cal. 368, approved the ruling of the court below in the case at bar that the City was estopped to retract its consent to the continued use of the river water by the Company; but, from an examination of the former case it will be found that the question was not involved.

That suit was for the purpose of appointing a

receiver to take possession of the water works which had been constructed by the Company under the contract of 1868, and to collect the water rates.

The *nisi prius* Court refused to appoint a receiver of the works, but did appoint one to collect the rates.

The Supreme Court held that the City was not entitled to possession until payment or tender of the value of the works, and had no right to interfere with the contracts for the sale of water which had been made by the Company with the rate-payers, and, for these reasons, reversed the order appointing the receiver.

The question concerning the right to the water of the river was not involved, as the City sought to obtain possession only of the distributing system and not of the water.

On petition for rehearing, the Supreme Court practically struck out everything that had been said with regard to the City's right to the water and in effect held that it owned the waterworks, subject only to a lien on the part of the Company with the right of possession to enforce the lien.

Can the complainants maintain this suit to enforce the obligations of an executory contract where they are violating a substantial dependent covenant of the same contract?

This suit is in the nature of a bill for specific performance of the contract, and is therefore

governed by the same rules applying to such suits.

"An injunction restraining the breach of a "contract is a negative specific enforcement of "that contract. The jurisdiction of equity to "grant such injunction is substantially coinci- "dent with its jurisdiction to compel a specific "performance. Both are governed by the same "doctrines and rules; * * ."

Sec. 1341 Pomeroy Equity Jurisprudence.

"The doctrine is fundamental that either of "the parties seeking a specific performance "against the other, must show, as a condition "precedent to his obtaining the remedy, that he "has done, or offered to do, or is then ready and "willing to do, all the essential and material "acts required of him by the agreement at the "time of commencing the suit, * * ."

Sec. 1407 Id.

We add that, in the case of Santa Ana Water Co. v. S. B. Ventura 56 Fed. 339, cited by appellees, the franchise was granted to and held by private individuals at the time of the passage of the confirmatory statute.

In Stein v. Mobile, 49 Ala. 362 (which would appear from the report to have sustained the grant of a water franchise under general power to a city to provide a water supply), the franchise was confirmed by the Legislature, as is shown in Stein v. Bienville W. Co. 141 U. S. 67, involving the same franchise.

We respectfully submit that the decree should be reversed on each of the grounds we have specified.

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WALTER F. HAAS,
LEE & SCOTT,
Of Counsel.

APPENDIX.

Los Angeles City Water Co., vs. E. L. Stern, et al.—Plaintiff seeks by this action to obtain a decree enjoining defendants from erecting a system of water works and from supplying the City of Los Angeles and its inhabitants with water.

In support of its right to such a decree plaintiff by its complaint alleges that it is the owner of the exclusive right to furnish the inhabitants of the city of Los Angeles with water under special franchises granted by the city authorities to certain parties and assigned by them to plaintiff and by reason of an act of the Legislature approved April 2, 1870, ratifying the grant by the city.

Plaintiff further alleges its compliance with all the conditions of its franchise, and its expenditures of large sums of money thereunder, and that defendants threaten to construct a rival system and thereby seriously impair the revenue of plaintiff from its water works.

The contract and ordinances under which plaintiff claims its exclusive franchise are made a part of the complaint and copies thereof annexed as exhibits.

Defendants meet the complaint by a general demurrer, and upon the argument thereof both sides have presented at length and with great learning a large number of points involving grave questions of constitutional law and have supported their respective views by the citation of a very great number of authorities.

Prior to the adoption of the constitution of 1879, the right to construct a system of water works and supply water was dependent upon a grant from the sovereign power either directly or through a municipality.

But the right was extended to all persons or companies under certain conditions by section 19, article XI of the Constitution

"Sec. 19. In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual or any company duly incorporated for such purpose, under and by authority of the laws of this state, under the direction of Superintendent of Streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connection therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants, either with gaslight or other illuminating light or with fresh water for domestic and all other purposes, upon the condition that the municipal

government shall have the right to regulate the charges thereof."

The purpose of that section may be easily gathered from the language, as well as from a general knowledge of the condition of affairs in any city where a corporation has control of the entire water supply and by the exercise of its political influence may prevent the grant of a franchise to any competing company.

The purpose was to prevent in the future any monopoly in the hands of private parties or corporations. The right is not limited to cities in which the water works are not owned by the municipality, but it is also extended to cities where the public works are not controlled by the municipality.

The complaint in this case alleges that the city of Los Angeles owns and controls public works for the supply of water but as the particular mode in which those works are operated is set out in the complaint, and shows that they are not operated by the city, or in its possession, but are held by the plaintiff, it is clear that they are not owned and controlled by the city; and any individual or company can construct its system of water works unless there is some limitations on such right, occasioned by the existence of any exclusive franchise in others.

That the provision of the constitution was self-executing, and did not depend upon legislation to put it in operation was expressly determined by the Supreme Court, in the following language:

"That privilege is expressly granted by the section of the constitution cited, subject to the direction of the Superintendent of Streets or other officer in control thereof, and under such general regulation as the municipality may prescribe for damages and indemnity for damages, and upon the condition that the municipal government shall have the right to regulate the charges thereof. The purpose of this provision was thus explained by the gentleman at whose instance it was inserted in and became a part of the constitution: 'It gives to any individual, as well as to any incorporated company, the right to the use of the streets for laying down pipes for the supply of gas and water or either. I think that the objection that was taken to the section as formerly introduced was well taken—that it should not be limited to corporations; that any individual, for the public good, should have the right to use the streets for laying down pipes for supplying water or gas. It is in the public interest that it should be conceded, and it prevents monopoly in any sense. It also provides that the city authorities may make a regulation requiring all work to be done under the supervision of the Superintendent of Streets.

and also, if any damage should be likely to occur, they may, by security or otherwise, guard against it. . . .

"Then it provides that the city and county shall have the right to regulate the price to be paid by the inhabitants for the gas and for the water. This is also a necessary regulation, I think against the abuses of monopoly. Now, in Los Angeles, we have a gas company with a monopoly for twenty years, and several parties have endeavored to get the privilege for laying down pipes in the streets for the purpose of supplying the city and competing with this company, but the company has always had sufficient influence in the municipal government to prevent this being done, and this company has a prospect of exclusive right for twenty years to come. Now, I submit to the convention that this is a great abuse of public authority and that it ought to be corrected. We have, also there, a water company that claims the monopoly, and the private individual who did succeed in laying down pipes and is to some extent supplying the city with water in opposition to the monopoly, is threatened constantly with suits and injunctions, and if this thing goes on we will have a monopoly, not only of water and gas, but of all domestic necessaries, and then we will have some company peddling it by the tin cup full. It is time this abuse was corrected, and, therefore, I offer this amendment'—which "amendment" is the clause of the constitution now under consideration. (Debates Cons. Con., Vol. 2, p. 1075.)

"We have quoted at length the remarks accompanying the introduction of the provision, for the purpose of showing that the members of the Constitutional Convention had distinctly put before them the evils intended to be remedied, and the purpose of the enactment; and thus informed, they adopted it. Yet we are asked to hold in effect, that after all, the whole matter rests where it did before—with the Legislature. This we cannot do. Nor, under our construction of the provisions in question, do we discover any indication of a return 'to the doctrine of the Dartmouth College case,' nor any fostering of monopolies but, on the contrary, the most manifest intent to prevent them as respects the important subjects treated of—gas and water. By the adoption of those provisions the people asserted their unwillingness to leave the entire subject in the hands of the Legislature, and in the particulars already indicated, declared the rule that should govern, in the organic law itself, and gave to the Legislature the 'regulation and control' in all other respects." People vs. Stephens, 62 Cal., p. 209.

It is clear from the remarks of the author of the section who was the late Judge Volney E. Howard, a lawyer of great learning and thoroughly familiar with the status of the plaintiff's contract with the city of Los Angeles), that he construed the section to include within its purview the city of Los An-

geles; and it seems probable that the word "controlled" was used with the purpose of covering the circumstances existing in this city with reference to the water works.

If, however, at the time of the adoption of the Constitution of 1879 there existed a valid grant to the plaintiff in this case of an exclusive franchise for the sale of water in the city of Los Angeles, then the constitutional provision conferring upon any person or corporation the right to construct a system of water works in any municipality where no such public works are owned and controlled by the municipality would be inoperative as against such right, because such provision would be in violation of the Constitution of the United States, as under it no state can impair the obligation of a contract by her organic law or by legislative enactment.

That the sovereign power of a state can enact an exclusive franchise in the absence of any provision of its constitution forbidding the same has been established by the decisions of the Supreme Court of the United States in the slaughter-house cases and in the New Orleans gas and water cases. The exclusive privilege in the slaughter-house cases was sustained by a divided court, upon the ground that it was a police regulation and that the Legislature had the power to grant the exclusive privileges tested in those cases. The minority of the court dissented from the view of the majority, upon the theory that the Legislature was interfering with the carrying on of ordinary vocations and establishing a monopoly, and thereby violating the provisions of the thirteenth and fourteenth amendments to the Constitution of the United States, which protect from hostile legislation of the states the privileges and immunities of citizens of the United States. It was subsequently held however, that while the Legislature could, as a police regulation, grant the exclusive franchises conferred by the slaughter-house acts, that such legislation, being under the police power of the state, was subject to the control of subsequent Legislatures, and that such legislation could be repealed without impairing the obligation of a contract, as one Legislature could not surrender any portion of the police powers of the State. (Butchers' U. S. H. & L. S. L. Company vs. Crescent City L. S. L. & S. H. Company, 113 U. S. Supreme Court Reports, page 746.

But the rule with regard to the grant of exclusive privileges for the supply of gas or water rests upon an entirely different principle, as laid down by the Supreme Court of the United States. The Supreme Court of the United States, in the case of the New Orleans Gas Light Company vs. Louisiana Light & Manufacturing Company, 115 U. S., 650, say:

"We have seen the manufacture of gas, and its distribution for public and private use, by means of pipes laid, under legis-

lative authority, in the streets and ways of a city, is not an ordinary business in which every one may engage, but is a franchise belonging to the government, to be granted, for the accomplishment of public objects, to whomsoever, and upon what terms, it pleases. It is a business of a public nature, and meets a public necessity for which the state may make provision. It is one which, so far from affecting the public injuriously, has become one of the most important agencies of civilization for the promotion of the public convenience and the public safety.

"It is to be presumed that the Legislature of Louisiana, when granting the exclusive privileges in question, deemed it unwise to burden the public with the cost of erecting and maintaining gas works sufficient to meet the necessities of the municipal government and the people of New Orleans, and that the public would be best protected, as well as best served, through a single corporation invested with the power, and charged with the duty of supplying gas of the requisite quality and in such quantity as the public needs demanded. In order to accomplish what, in its judgment, the public welfare required, the Legislature deemed it necessary that some inducement be offered to private capitalists to undertake, at their own cost, that work. That inducement was furnished in the grant of an exclusive privilege of manufacturing and distributing gas by means of pipes laid in the streets of New Orleans for a fixed period, during which the company would be protected against competition from corporations or companies engaged in like business. Without that grant it was inevitable, either that the cost of supplying the city and its people would have been made in some form, a charge upon the public, or that the public would have been deprived of the security in person, property and business which comes from well-lighted streets."

And, in the case of New Orleans Water Works Company vs. Rivers, 115 U. S., 674, the Court says:

"This case is, therefore, controlled by the decision just rendered in New Orleans Gas Light Company vs. Louisiana Light and Heat Producing and Manufacturing Company. The two are not to be distinguished upon principle; for, if it was competent for the State, before the adoption of the present Constitution, as we have held it was, to provide for supplying the city of New Orleans and its people with illuminating gas by means of pipes, mains and conduits, placed at the cost of a private corporation in its public ways, it was equally competent for her to make a valid contract with a private corporation for supplying by the same means pure and wholesome water for like use in the same city. The right to dig up and use the streets and alleys of New Orleans for the purpose of placing pipes and mains to supply the city and its inhabitants with wa-

ter is a franchise belonging to the state, which she could grant to such persons or corporations, and upon such terms, as she deemed best for the public interest. And as the object to be attained was a public one, for which the State could make provision by legislative enactment, the grant of the franchise could be accompanied with such exclusive privileges to the grantee, in respect of the subject of the grant, as in the judgment of the Legislative department would best promote the public health and the public comfort, or the protection of public and private property. Such was the nature of the plaintiff's grant, which not being at the time prohibited by the constitution of the state, was a contract, the obligation of which, cannot be impaired by subsequent legislation, or by a change in her organic law. It is as much a contract, within the meaning of the Constitution of the United States as a grant to a private corporation for a valuable consideration, or in consideration of public services to be rendered by it, of the exclusive right to construct and maintain a railroad within certain lines and between given points, or a bridge over a navigable stream within a prescribed distance above and below a designated point."

Both the above cases hold that the provision of the Constitution of Louisiana against monopolies would not affect the exclusive franchises granted before the adoption of the Constitution. It will, therefore, be observed that both cases are directly applicable to the question in this case; and that, if there was no provision in the Constitution of California restricting the valid grant of an exclusive franchise for the supply of water to the city of Los Angeles, and such an exclusive franchise was granted by the State, or by the municipality by virtue of power delegated to it by the State prior to 1879, that the rights of plaintiff thereunder would not be affected by the constitutional provision in the State Constitution above cited.

It becomes necessary, therefore, to construe the contract under which plaintiff claims this exclusive privilege, and determine whether it undertakes to grant such an exclusive franchise; and, if it does, whether there existed any provisions under the old Constitution which rendered such grant invalid.

Defendants argue that the contract under which plaintiffs claim does not undertake to grant any exclusive franchise, and that the subject matter dealt with is the waters of the Los Angeles river alone, and does not affect the construction of any system seeking to supply the inhabitants of the city of Los Angeles with water from another source.

The strongest clause of the contract with reference to the exclusive privilege is the following: "And the said party of the first part hereby covenant and agree to make no other lease, sale, contract, grant or franchise to any person or per-

sons, corporation or company, for the sale or delivery of water to the inhabitants of said city for domestic purposes during the continuance of this contract."

Defendants argue that the contract has for its subject matter the sale and disposition of the waters of the Los Angeles river alone; that the supply of water granted by the lease was such that it could not be reasonably expected that it would be sufficient to furnish water to all the inhabitants of the city of Los Angeles during the period of the continuance of the lease.

While it is true that the principal portions of the contract are with reference to the lease of the water works owned by the city and of a water right in the river for the period of the lease; yet the whole contract, construed together, shows that the lessees were bound, under its terms, to supply all portions of the city with water for domestic purposes; and were required to construct such a system as would secure to the inhabitants of the city a constant supply for domestic purposes, and to construct reservoirs of sufficient capacity for that purpose; and were required to extend their pipes "as fast as the citizens desiring to be supplied with water for domestic purposes will agree to take sufficient water to pay ten per cent per annum on the cost of extending such pipes through the streets now supplied wih water." While the supply was limited to ten inches of water the contract seems to indicate that it was anticipated that that grant would be increased in quantity by the authorities of the city should it be necessary.

The provisions of the clause above cited are very broad, and none of the authorities cited by counsel for defendants justify the Court in limiting its meaning to the waters of the Los Angeles river. While the words "lease, sale, contract and grant" might be so limited, the word "franchise" carries with it a much broader meaning, and includes all the rights granted by virtue of which a party can furnish water to a city. There is no limitation anywhere confining it to the particular waters mentioned in the contract, and the only limitation upon it is that it applies only to the sale or delivery of water for domestic purposes, and that it is without prejudice to rights already granted. That the parties understood it to be very broad in its nature is shown by the fact that a subsequent clause is inserted specially excepting from its meaning the water works of the city used for the distribution of water for the purposes of irrigation.

In the case of Stein vs. Bienville Water Supply Company 34 Fed. Rep., 145, cited by counsel, the franchise used the phrase, "The sole privilege of supplying the city of Mobile with water from Three Mile Creek;" and the Court, in discussing it, says: "The subject matter of the agreement was the supplying of water to the city of Mobile, and while it is clear the primary

object in view was to secure an adequate supply of pure, wholesome water, it seems to me equally clear from the language used in the contract, in view of the circumstances under which it was made, that the intention was to grant Stein the sole privilege of supplying the city with water from Three Mile creek and from no other source. Throughout the whole agreement the exclusive right granted Stein is thus described: 'The sole privilege of supplying the city of Mobile with water from Three Mile Creek.' No other source seems to have been thought of.

Another clause in the agreement is that Stein shall have power and authority to conduct the water from any part of Three Mile creek. This creek, as the source of supply, was distinctly agreed on and specifically named. If the intention was to grant the sole privilege of supplying water from any and all sources, why use the qualifying words 'from Three Mile creek?'"

In this case, if the city had intended to limit the exclusive privilege to waters from the Los Angeles river, the limitation would certainly have been made by qualifying the words in the clause cited. Other sources of water must have been known to exist at that time within the region surrounding the city.

In the case of the Gas-light Company vs. the City of Saginaw, 28 Fed. Rep., p. 528, the question involved was as to whether a contract granting "the exclusive right to light a city with gas for thirty years" was impaired by a subsequent contract with another company to light the streets with electricity, and the court held that it was not.

In the case of the Omaha Horse Railway Company vs. Cable Tramway Company, 30 Fed. Rep., p. 324, the pleaintiff had an exclusive grant of a right to build, erect and operate horse railways in the city of Omaha, and sought to enjoin the defendant from the construction of a cable road; and the Court held that the language of the contract would not be extended by implication to include any railway system other than horse railway, as specifically mentioned in the contract.

In the case of Bartram vs. the Central Turnpike Company, et al., 25 Cal., the Court held that the grant of a franchise was not exclusive unless expressly made so by the grant itself.

The case of the Bridge Proprietors vs. Hoboken, 1 Wallace, p. 116, referred to by counsel for defendants as a strong case, goes no further than the other cases above mentioned. In it the Court holds that the construction of a railroad bridge did not interfere with plaintiff's exclusive right to the maintenance of a toll bridge, for the reason that the railroad bridge, although called by the name "bridge," was a structure entirely different in character from that maintained by plaintiff; that it did not directly interfere with the business of revenue of

plaintiff, and that the only effect of the granting of an injunction would be to divert the line of the railway; and that whether the bridge should be constructed in the place proposed by defendant or elsewhere, the effect upon the traffic over plaintiff's bridge would be the same.

The cases cited by counsel, and many others examined by the Court establish the rule, well recognized by the Courts, that when an exclusive franchise is claimed the Court will not, in the construction of the contract, exercise any liberality whatever toward the party claiming it, and will not extend its meaning in any way whatsoever by implication. If there be any ambiguity the benefit of all doubt will be given against the claim of an exclusive franchise.

The sections of the Civil Code cited by counsel, it will not be disputed, fix the law with regard to the interpretation of contracts, and are a condensation of the law as it existed prior to their adoption, as laid down by the courts both of the United States and England as to the construction of contracts; but those rules apply only to cases where there is an ambiguity, and that proposition is expressly laid down in the Civil Code, which provides that:

"Section 1637. For the purpose of ascertaining the intention of the parties to a contract, if otherwise doubtful, the rules given in this chapter are to be applied."

"Section 1638. The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."

"Section 1639. When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this title."

In this case the clause of a contract with regard to the exclusive character of the franchise does not appear to the Court to be in any manner ambiguous, or require the application of any rule for the purpose of construing it other than the understanding of the express meaning of its language. There is no provision in the contract in conflict with it; but the other provisions indicate that it means just what it says, and that it was not the intention of the parties to limit its meaning.

Construing the contract, therefore, as the grant of an exclusive franchise, it becomes necessary to pass upon its validity. The doctrine of estoppel, laid down in the cases cited by counsel for the plaintiff, has no bearing in my opinion, upon this action. If the contract be valid the doctrine of estoppel in no way benefits the plaintiff; if the contract be void from the beginning, then in a case like this, the doctrine of estoppel cannot give it validity.

The cases cited by counsel for the plaintiff are those in

which a city has been held liable upon its bonds, although they were issued without proper authority. But the circumstances of these cases are quite different from the one at bar. In the former the city has received into its treasury money obtained by the sale of its bonds, and good faith requires its return to the proper owner, who has paid it without consideration. But in such a case as this, if a portion of the contract be unconstitutional, the party making it contracts at his peril, for it is his duty to know the law and the rights and liabilities of the city, and one council or legislature, by unauthorized exercise of power, cannot bind its successors.

"When a statute is adjudged to be unconstitutional it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it; and no one can be punished for having refused obedience to it before a decision was made. And what is true of an act void in toto is true also as to any part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never at any time been possessed of any legal force." Code of Con. Lim., p. 224.

Dismissing, therefore, the question of estoppel entirely from the case, I pass to the consideration of the power of the city of Los Angeles to make this contract. Unless that power was conferred by the Legislature upon the city, or its exercise subsequently ratified by an Act of the Legislature which was not obnoxious to a constitutional inhibition, the contract would be invalid.

My attention has not been directed to any statute, nor have I been able to find any, which conferred upon the authorities of the city of Los Angeles power to grant an exclusive franchise and to bind the sovereign power of the State to its perpetuation for the period of thirty years. That such a power cannot be exercised without an express grant from the Legislature is clearly established.

Justice Nelson, in discussing the power of a municipality to grant such exclusive franchises without express authority from the Legislature, says:

"It is a well settled rule of construction of grants by the Legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the Act, or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the Legislature must be resolved in favor of the public. This principle has been so often applied in the construction of corporate powers that we need not stop to refer to authorities.

"Now, looking at the terms of the grant in this case, and giving to them their widest meaning, either separately or in the connection in which they are found, or with the object for which the power was conferred, we find, indeed, a power to establish and regulate ferries within the corporate limits of the town, but not an exclusive power. Full effect is given to the words in which the power is granted, when the simple right is conceded to establish and regulate ferries. If the grant had been made to an individual in the terms here used, the question would have been too plain for argument. In our judgment it can have no wider interpretation, though made to a corporation. It must be remembered that this is not the case where the Crown or the Legislature has aliened to a municipal corporation its whole power to establish and regulate ferries within its limits, as may be found in some of the ancient charters of cities in England and in this country. In those cases the municipal body, in respect to this legislative or public trust, represents the sovereign power, and may make grants of ferry rights in as ample a manner as the sovereign. The error, we think, in the argument for the appellant is in confounding this grant with these ancient charters, or those of a like character. But on referring to them it will be seen that the form of the grant is very different, much more particular and comprehensive, leaving no doubt as to the extent of the power (25 Wend. R. 631, Coster vs. Brush). So here: If the Legislature had intended to confer their whole power upon this corporation to establish and regulate ferries within its limits, or a power to grant exclusive ferry rights therein, a very different form of grant would have been used—one that would have expressed the intent of the law maker to part with the exclusive power over the subject, and vest it in the grantee. In the form used, no such intent appears or can be reached, except by a very forced interpretation, which we are not at liberty to give, according to well settled authority. (11 Pet. 422; 8 How. 569; Mills et al. vs. St. Clair Co. et al., 16 ib., 524, 534; Fanning vs. Gregoire.)"

Mintern vs. Larue et al., 23 Howard U. S.

Supreme Court Reports, p. 435.

The only statute which can be construed to give the city power to grant an exclusive franchise was the act for the incorporation of water companies, approved May 3, 1852; and that only grants by implication the right to give a franchise for a term not exceeding twenty years—a period longer than that during which the plaintiff has enjoyed its present franchise. But the act of April 22, 1858, contains the following provision:

"Section 3. All privileges, immunities and franchises that may hereafter be granted to any individual or individuals, or

to any corporation or corporations, relating to the introduction of fresh water into the city and county of San Francisco, or into any city or county of this state, for the use of the inhabitants thereof are hereby granted to all companies that are incorporated or that may hereafter become incorporated for the purposes aforesaid"; which later act, of course, repeals the inconsistent provision of the former.

The provision of the contract granting an exclusive franchise to plaintiff's predecessors in interest was, therefore, entirely without authority of law, and in violation of the general laws of the State.

But if it has been ratified by a constitutional act of the Legislature, plaintiff's position can be sustained, since the Legislature can validate and confirm the previous act of a municipal incorporation, although it would otherwise be invalid.

The first objection made by the counsel for defendants to the act of 1870, which attempted to ratify the contract, is that it is void, because it embraces more than one subject, and the title does not express any subject, and therefore is in violation of section 25, article 4, of the old constitution, which provided that "Every act shall embrace but one subject, which shall be expressed in the title." The act in question is certainly open to the objection made by defendants, and the authorities cited by them from other States might lead the Court to hold it invalid were it not for the fact that the Supreme Court of our own State has, on several occasions, held that that provision of the old constitution was merely directory, and did not defeat any law passed in violation of its provisions.

The question was first passed upon in the case of Washington vs. Page 4th Cal., p. 388, in which the Court said: "We regard this section of the Constitution as merely directory, and if we were inclined to a different opinion, would be careful how we lent ourselves to a construction which must in effect obliterate almost every law from the statute book, unhinge the business, and destroy the labor of the last three years."

That doctrine was approved in ex parte Newman, 9 Cal. 523.

The question was again raised in the case of Pierpont vs. Crouch, 16th Cal., p. 315, in which the Court approved the doctrine laid down in Washington vs. Page, and added, after the quotation given above from that decision, "The object of the Constitutional provision was to secure some congruity or connection in the subjects embraced in the same statute, but as the provision is merely directory, it can only operate upon the conscience of the law-maker. It creates a duty of imperfect obligation for the infraction of which there is no remedy in the courts."

It was to avoid this doctrine that the provision was in-

serted in the constitution of 1879, declaring it mandatory in all respects.

The objection is also made to the Act of 1870, that it does not ratify an exclusive grant; but, if the grant was exclusive, I take it that the Act of 1870, if valid, ratifies it. Nor do I consider its uncertainty such as to render it void. The reference to the contract as in the Miscellaneous Records of Los Angeles County, and also in consideration of the fact that it was officially adopted by a municipality whose own records are public and presumed to be preserved, make it sufficiently definite in showing what the contract was that the Legislature sought to ratify. That it was a vicious and careless mode of legislation is not sufficient reason to pronounce it void.

It was, however, in my opinion, repugnant to the provisions of section 11, article 1, of the old constitution, which declared "all laws of a general nature have a uniform operation."

The act of 1858, above cited, was a law general in its nature; and the Legislature could not, by a special act, exempt either a person or a corporation from its operation. That act gave to every corporation formed for the purpose of supplying water all the privileges and immunities which were conferred by any municipality upon any other corporation formed for that purpose.

The act of 1870 stands upon precisely the same footing as the act pronounced unconstitutional in the case of the Omnibus Railroad Company against Baldwin, 57 Cal., p. 164. It could, with as much force, have been claimed in that case that the special act repealed the general law so far as it was inconsistent; but the court held otherwise.

The general law provided that all corporations incorporated under the act of 1858 should have the same privileges, immunities and franchises that might thereafter be granted to other individuals or corporations. But the act of 1870 undertook to exempt the plaintiff or its predecessors from the operation of that statute, and to deprive all other corporations of any rights thereunder within the city of Los Angeles. The Legislature had the power to repeal that act, but it had no power to suspend its provisions as to one particular set of persons, or corporation.

The act of 1870 was also void, in my opinion, because unconstitutional and in violation of section 31, article 4 of the old constitution, providing as follows: "Corporations may be formed under general laws, but shall not be created by special act."

By a strict construction of the language of that section it was plausibly argued in other cases that the Legislature, although it could not form a corporation by a special act, might

cases the Supreme Court has laid down a different rule. It appears by plaintiff's complaint that, prior to the adoption of the act of 1870, the original grantee in the lease from the city had assigned all rights thereunder to the plaintiff. That assignment did not vest in plaintiff any right to an exclusive franchise, because the city had no power to grant such franchise; but the assignment did carry with it all actual rights under the contract, which was valid except as to the one provision. The grantors of plaintiff had no rights remaining in them after the assignment, and could take nothing under the subsequent act of the legislature.

Since the provision for an exclusive franchise in the original contract was void, the act of 1870, if it had any effect, was practically a grant by the sovereign power to the plaintiff, a corporation, of an exclusive franchise, and it thereby conferred upon that corporation special and different powers from that given to other corporations by general law. It was not a mere property right, but a franchise, a portion of the prerogatives of the State similar in all its characteristics to the other rights delegated by the State to its corporations, and subject to the same rules.

The case of San Francisco vs. Water Works, 48 Cal., 493, in which the constitutionality of what is known as the Ensign Act was considered, is the leading case upon this subject. By the Ensign Act the Legislature undertook to confer upon certain persons certain powers and privileges and rights upon condition that they would organize as a corporation within a certain period. It was argued in that case that the Legislature did not form a corporation by special act, because it was provided that the incorporation should be made under the general laws. But the Supreme Court held that special privileges were conferred upon the corporation and that the Act was unconstitutional. The Court says in that case: "It was the special purpose of the framers of our constitution to guard against these abuses by providing that 'corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes.' Nor were they content to leave it doubtful whether the Legislature would have power to modify or abrogate these general laws or special acts to create municipal corporations, so as to affect the rights of existing corporations; hence, the constitution contains the further provision that all general laws and special acts 'passed pursuant to this section may be altered from time to time or repealed.' It was intended by this provision to keep corporations within a wholesome legislative control, and to repel the assumption that their rights were held under a contract, which the Legislature was powerless to modify. Under these provisions the

source from which private corporations must derive their powers and immunities is perfectly apparent. They can only 'be formed under general laws,' and can exercise no powers, except such as are derived from general laws. If this provision means nothing more than that the Legislature shall prescribe the mere formula by which a corporate entity may be called into life and may then proceed to confer upon it by special act, at its discretion, extraordinary powers and privileges which it could not afterwards revoke or modify because they were granted under special and not general laws, then, indeed, has the Constitution failed to provide a remedy for the abuses already adverted to. On this construction, when a railroad corporation is once formed under a general law, the Legislature, by special grant, may confer upon it extraordinary powers, greatly in excess of those exercised by other similar corporations. It may authorize it to engage in banking, mining, or any other business enterprise, or to charge higher rates of fare than are permitted to other competing roads. In like manner it might discriminate in favor of a particular banking corporation, or confer special, or perhaps, exclusive privileges on a particular mining, insurance or manufacturing corporation. But on the other, and the true construction of this constitutional provision, all private corporations must derive their powers from general laws, and not from special statutes. The general laws under which they were formed, and such others as shall afterward be enacted, must alone define their rights and powers. On this theory, all private corporations, formed for similar purposes, will stand upon the same footing, enjoy the same rights and be subject to the same burdens, which cannot be increased or diminished except by general laws applicable to all. In harmony with this theory, and accepting this as the true construction of the constitution, the Legislature, at its first session, enacted general laws under which private corporations might be formed, and defining minutely their powers and duties. These laws have been modified from time to time, but have never omitted to prescribe the powers to be exercised and the duties to be performed by the corporation. Nothing short of some imperative rule of constitutional construction would justify us in holding, at this late day, that, though corporations must be 'formed' under general laws, it is nevertheless competent for the Legislature by special grant, to confer upon a corporation once organized, any powers, however extraordinary. We think, on the contrary, that no corporate rights or powers can be conferred by special grant, but must all be derived under general laws."

The same construction is given to section 31, article 4, of the old constitution in the cases of

Waterloo, etc., Company vs. Cole, 51, Cal., 381.

Spring Valley Water Company vs. Bryant, 52 Cal. 132.

The same provision was incorporated in the new constitution as section 1 of Article XII; and our Supreme Court, in case of the People vs. Central Pacific Railroad, 83 Cal., p. 413, discusses that provision.

* * * * * *

The case of the People vs. Stanford, in 77 Cal., simply holds that a corporation can take by assignment from individuals a franchise which they lawfully exercise; but that state of affairs does not exist in this case as far as the exclusive franchise is concerned. The individual grontors of plaintiff never took any such right whatever, never possessed any exclusive franchise, and their assignment did not pass one to plaintiff. If plaintiff has any such right it must have come from the act of the Legislature passed in 1870, after the assignment of the lease to plaintiff.

The plaintiff also claims that section 548 of the Civil Code of California confirmed this contract and established their exclusive right, but I do not so understand it.

There is nothing in that section to indicate that it was intended to be retrospective in effect; but, on the contrary, its language indicates that it was intended to regulate towns and municipalities in their making of contracts for the supplying of the city with water after its enactment; and, though general in form, if it could be construed to have the effect claimed by plaintiff, its effect in this case would be special, and would confer upon a corporation special privileges and immunities, and would exempt it from the uniform operation of general law.

A portion of the section, it might be remarked, is not now in effect, as it is inconsistent with the provision of section 19, article 11, of the new constitution, which permits any corporation to supply water without being authorized by any special ordinance or contract with the city, except in cities where there are public works owned and controlled by the municipality for suppliyng the same with water.

It follows, as a conclusion, that the portion of the lease from the city, under which plaintiff claims, and which purports to grant it an exclusive franchise, is void, because the city had no power to grant such exclusive privilege; and the attempted ratification of such grant by the Legislature was unconstitutional, and therefore void; and plaintiff never has, and does not now, posses an exclusive franchise, for the supplying of the city of Los Angeles with water; and the defendants have the right, under section 19, article II of the Constitution, to construct a system of water works and lay their pipes in the city of Los Angeles; and the demurrer of defendants should be sustained, and it is so ordered.